TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, PETITIONER,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,905)

(35,905)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Page
Record from district court of the United States, district of Arizona	2
Complaint, No. L-695	2
Exhibit "A"—Claim of Arizona Grocery Co	9
Exhibit "B"—Report of I. C. C., No. 16742	18
Exhibit "C"—Order of I. C. C., No. 16742	46
Complaint, No. L-696	48
Exhibit "A"—Claim of Arizona Grocery Co	55
Exhibit "B"—Report of I. C. C., No. 16742	61
Exhibit "C"—Order of I. C. C., No. 16742	90
Summons and returns	92
Demurrer, No. 695	99
Demurrer, No. 696	100
Answer, No. 695	101
Answer, No. 696	109
Stipulations for consolidation	118
Request for special findings, No. 695	120
Request for special findings, No. 696	120
Stipulation for procedure	121

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Page

Request for findings of fact and conclusions of law, No. 695.... 122
Findings of fact and conclusions of law, No. 695..... 123
Request for findings of fact and conclusions of law, No. 696.... 130
Findings of fact and conclusions of law, No. 696..... 131
Special findings of fact and conclusions of law requested by defendants 139
Defendants' exceptions and objections to plaintiff's requested findings and conclusions..... 215
Stipulation for consolidation of record..... 222
Order for consolidation of record..... 224
Judgment, No. 695..... 225
Judgment, No. 696..... 228
Notice of application to tax costs, No. 695..... 230
Statement of costs, No. 695..... 231
Notice of application to tax costs, No. 696..... 232
Statement of costs, No. 696..... 233
Objections and exceptions to plaintiff's statements of costs..... 235
Order continuing time to answer..... 237
Minute entries..... 238
Order re demurrer..... 238
Order for hearing..... 239
Order consolidating cases, etc..... 240
Order extending time..... 241
Order overruling demurrer..... 241
Order denying motion to dismiss..... 242
Order for hearing..... 243
Order continuing hearing..... 243
Order re attorney's fees..... 244
Order re proposed findings and conclusions..... 245
Order for consolidation of record..... 247
Order re findings and conclusions..... 248
Order overruling objections to ruling as to costs..... 249
Order extending time..... 249
Order allowing appeal, No. 695..... 250
Order allowing appeal, No. 696..... 251
Orders approving bonds..... 252
Order settling bill of exceptions..... 253
Bill of exceptions..... 253
Caption 253
Stipulation of facts..... 254
Exhibit 1—Report and order of I. C. C., No. 11532..... 263
Exhibit 2—Report and order of I. C. C., No. 14449..... 276
Exhibit 3—Report and orders of I. C. C., No. 16742, etc.... 290
Stipulation as to procedure..... 319
Plaintiff's Exhibit "A"—Order of I. C. C., No. 16742..... 321
Plaintiff's Exhibit "B"—Claim No. 805-1..... 324
Plaintiff's Exhibit "C"—Claim No. 806-2..... 328
Testimony of Frank L. Snell..... 333
Samuel White..... 335
A. B. Mason..... 337
Thomas G. Nairn..... 343

	Page
Defendants' requested findings and conclusions	345
Findings of fact and conclusions of law	355
Defendants' exceptions to findings and conclusions	375
Order settling bill of exceptions	380
Petition for appeal, No. 695	381
Petition for appeal, No. 696	382
Assignments of error	384
Order allowing appeal, No. 695	407
Order allowing appeal, No. 696	408
Bond on appeal, No. 695	409
Bond on appeal, No. 696	413
Præcipe for transcript of record	416
Clerk's certificate	418
Citation and service, No. 695	420
Citation and service, No. 696	421
Statement as to printing record	423
Stipulation as to record	426
Proceedings in United States circuit court of appeals, ninth circuit	435
Order of submission	437
Order directing filing of opinion and judgment	438
Opinion, Wilbur, J	438
Judgment	463
Motion to stay issuance of mandate	464
Order staying issuance of mandate	465
Clerk's certificate	466
Order allowing certiorari	467

NAMES AND ADDRESSES OF SOLICITORS OF RECORD.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Arizona.

No. L.-695—PHX.

AT LAW.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

COMPLAINT.

Plaintiff by its attorneys, Elliott and Snell, complains of the defendants, and for its cause of action alleges:

I.

That at all times hereinafter mentioned plaintiff was a corporation organized under the laws of the State of Arizona and qualified to do business in said State of Arizona.

II.

That at all times hereinafter mentioned the defendants Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Company, were and now are railroad corporations engaged in the operation of railroads and railroad lines, and the defend-

ant Bay Transport Company was and now is a water transport line, that all of said defendants were and now are engaged in the transportation of freight and interstate commerce, and the Bay Transport Company and the Southern Pacific Company were at all times herein mentioned connecting carriers with the said defendant Atchison, Topeka and Santa Fe Railway Company, and between which there was an agreement for a joint line and arrangements for a continuous carriage of interstate shipments over their respective lines. [4]

III.

That between the sixth day of February, 1923, and the 10th day of Feburary, 1925, there was shipped by the above-named plaintiff to Phoenix, Arizona, over the lines of said defendants and entered Phoenix over the lines of the said Atchison, Topeka and Santa Fe Railway Company, fifty (50) carloads of sugar. That the shipments originated at San Francisco, California; Crockett, California; and Spreckels, California, as shown on Exhibit "A" attached hereto and made a part hereof.

IV.

That the said defendant Atchison, Topeka and Santa Fe Railway Company charged this plaintiff and this plaintiff was compelled to and did pay the said Atchison, Topeka and Santa Fe Railway Company, upon all of said shipments from said points in California, from the 6th day of Feburary, 1923, to the 10th day of February, 1925, inclusive, the following freight charges, to wit:

From San Francisco, California, between the dates of February 24, 1923, to the 7th day of January, 1924, inclusive, 86½ cents per hundred pounds, and from the 11th day of January, 1924, to the 10th day of February, 1925, 84 cents per hundred pounds;

From Crockett, California, between the dates of February 16, 1923, to the 4th day of January, 1924, 86½ cents per hundred pounds, and from the 3d day of Feburary, 1924, to the 19th day of August, 1924, 84 cents per hundred pounds;

From Spreckels, California, on the one shipment from said point, as shown on Exhibit "A" attached hereto, and received by the plaintiff on the 28th day of February, 1924, 84 cents per hundred pounds;

all as will more particularly appear from Exhibit "A" attached hereto and made a part hereof. That all of said shipments were made on through bills of lading, from said points of origin to said points of destination, and that the said freight charges as above set forth per hundred pounds were and [5] are unreasonable, as to this plaintiff, and a violation of *of* the Interstate Commerce Act of February 4, 1887, and Acts of Congress amendatory thereto, and that the just and reasonable freight rate which should have been charged on all of said shipments from said points of origin in California to said points of destination in Arizona after the date of July 1, 1922, was 73 cents per hundred pounds.

V.

That prior to the filing of this complaint plaintiff filed its petition and complaint with and before the Interstate Commerce Commission of the United States alleging that the rates and charges on all of said shipments from said points of origin in California to said points of destination in Arizona were unjust and unreasonable, as to the plaintiff and that thereafter the above-named defendants filed their answer with and before the Interstate Commerce Commission, said cause being docketed under Docket No. 16,742.

VI.

That said Interstate Commerce Commission made, issued, and filed its findings of fact on the 12th day of March, 1928; that said Commission found that the said rates of 86½ cents and 84 cents per hundred pounds as above set forth on said shipments from said points of origin in California to said point of destination in Arizona were unreasonable as to the plaintiff to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on and after July 1, 1922, and said Commission and said report and findings found that the plaintiff herein was entitled to reparations on all of said shipments from said points of origin in California to said points of destination in Arizona, and to interest thereon; copy of which report and findings of said Commission is attached hereto, marked [6] Exhibit "B" and made a part hereof; and that said Commission required and directed that said complainants should comply with

Rule V of the rules and regulations of the Interstate Commerce Commission, which rule required a statement of the shipments and dates on which charges therefor were paid; the car initials and numbers; the points of origin; the routes over which the shipments moved; the weights of shipments; the rates charged; the amount collected; the rate which should have been charged; the amounts which should have been collected; and the differences between the charges existing and those which would have accrued upon the basis of rates found reasonable by the Commission; that in pursuance of said requirements of the Interstate Commerce Commission the plaintiff herein did on the 16th day of April, 1928, properly certify a statement under said rule and transmitted same to the defendant Atchison, Topeka and Santa Fe Railway Company, and same was thereafter certified to by the Atchison, Topeka and Santa Fe Railway Company and was thereafter transmitted by the Atchison, Topeka and Santa Fe Railway Company to the Interstate Commerce Commission; a copy of which statement is attached hereto marked Exhibit "A" and made a part hereof.

VII.

Thereafter on the 11th day of March, 1929, the Interstate Commerce Commission duly made and published its order directing and requiring the defendants herein to pay unto said plaintiff Arizona Grocery Company the following sums, to wit:

Atchison, Topeka and Santa Fe Railway Company $2203.55

Atchison, Topeka and Santa Fe Railway Company and Bay Transport Company 1251.02

Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Company 297.04

together with interest thereon at the rate of six per cent [7] (6%) per annum from the respective dates of payment of the charges shown on Exhibit "A" attached hereto and made a part hereof; the said sums to be paid on or before the 26th day of April, 1929; said reparations being on account of the unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to points in Arizona, as will more particularly appear from the copy of said order hereto attached marked Exhibit "C" and made a part hereof.

VIII.

That said defendants have failed and refused to pay said reparation or any part thereof, either of principal or interest, though request and demand has heretofore been made by the plaintiff on the defendants for the payment of said reparations.

IX.

That by reason of said unreasonable rates and charges and the payment thereof by the plaintiff and by reason of the refusal of said defendants to pay said reparations awarded by the Interstate Commerce Commission, the plaintiff has been damaged in the total amount of Three Thousand Seven Hundred Fifty-one and 61/100 ($3,751.61) Dollars, to-

gether with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the charges as shown in Exhibit "A" attached hereto and made a part hereof; no part of which has ever been paid.

X.

That the sum of Fifteen Hundred ($1500.00) Dollars, which is a reasonable attorneys' fees, may be allowed by the Court in this action.

WHEREFORE, plaintiff demands judgment in its favor and against defendants for the sum of Three Thousand Seven [8] Hundred Fifty-one and 61/100 ($3,751.61) Dollars, together with interest thereon from the respective dates of payment as above set forth and as herein contained, together with Fifteen Hundred ($1500.00) Dollars as attorneys' fees and for plaintiff's costs and disbursements in this action; and plaintiff prays that process may issue herein.

ELLIOTT and SNELL,
Attorneys for Plaintiff. [9]

EXHIBIT "A."

133643—6

CLAIM No. 806-2 OF THE ARIZONA GROCERY COMPANY, UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET No. 16742—ON SUGAR, CARLOADS—DESTINATION, PHOENIX, ARIZONA.

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via. A. T. S. F. Ry. Co.						
1923.	1923.									
# 2-24	2-28	AT	26966	San Francisco	60450	86½	522.89	73	441.29	81.60
7-25	7-31	AT	36212	San Francisco	61152	86½	528.96	73	446.41	82.55
8-30	9- 6	AT	116775	San Francisco	60758	86½	525.56	73	443.53	82.03
10- 4	10- 9	AT	34714	San Francisco	60819	86½	526.08	73	443.98	82.10
11-16	11-21	DLW	43738	San Francisco	61093	86½	528.45	73	445.98	82.47
11-23	11-30	AT	63696	San Francisco	68450	86½	592.09	73	499.69	92.40
12- 1	12- 7	AT	116509	San Francisco	61115	86½	528.64	73	446.14	82.50

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via. A. T. S. F. Ry. Co.						
1924.	1924.									
1- 2	1- 7	AT	116055	San Francisco	60725	86½	525.27	73	443.29	81.98
1-11	1-17	AT	118045	San Francisco	61316	84	515.05	73	447.61	67.44
1-16	1-21	AT	39566	San Francisco	83955	84	705.22	73	612.87	92.35
Bay Transport. Co.										
1-18	1-24	AT	46224	San Francisco	60619	84	509.20	73	442.52	66.68
				Routed B. T. Co., S. F. A. T. S. F. Beyond.						
1-25	1-30	AT	27562	San Francisco	60715	84	510.01	73	443.22	66.79
				Routed via. A. T. S. F. Ry. Co.						
2- 4	2- 8	AT	32233	San Francisco	60770	84	510.47	73	443.62	66.85
2-20	2-26	AT	116304	San Francisco	60832	84	510.99	73	444.07	66.92
3-20	3-24	AT	118181	San Francisco	61224	84	514.28	73	446.94	67.34
5-17	5-22	AT	116599	San Francisco	61009	84	512.48	73	445.37	67.11
6- 3	6- 9	AT	117726	San Francisco	61195	84	514.08	73	446.72	67.36

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via. A. T. S. F. Ry. Co.						
1924.	1924.									
7– 7	7–14	AT	116356	San Francisco	60732	84	510.15	73	443.34	66.81
7–29	8– 4	AT	46535	San Francisco	61065	84	512.95	73	445.77	67.18
8–23	8–28	AT	38975	San Francisco	60959	84	512.06	73	445.00	67.06
9– 4	9– 9	AT	35968	San Francisco	60770	84	510.47	73	443.62	66.85
9–24	9–29	AT	117847	San Francisco	60915	84	511.69	73	444.68	67.01
1923.	1923.									
2– 6	2–13	AT	33480	San Francisco	60625	86½	524.41	73	442.56	81.85

[10]

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via. A. T. S. F. Ry. Co.						
1924.	1924.									
9–27	10– 3	AT	116476	San Francisco	60713	84	509.99	73	443.20	66.79
11–21	11–28	AT	65098	San Francisco	60871	84	511.32	73	444.36	66.96
12–27	12–31	AT	63603	San Francisco	60812	84	510.82	73	443.93	66.89
	1925.									
12–29	1– 3	AT	130017	San Francisco	80905	84	679.60	73	590.61	88.99
1925.	1925.									
1–22	1–25	AT	36086	San Francisco	61222	84	514.26	73	446.92	67.34
1–30	2– 4	AT	65112	San Francisco	60512	84	508.30	73	441.74	66.56
2– 3	2– 6	AT	43806	San Francisco	60700	84	509.88	73	443.11	66.77

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
1924.	1924.			Routed via. A. T. S. F. Ry. Co.						
2- 5	2-10	AT	47163	San Francisco	60737	84	510.19	73	443.38	66.81
										2203.55
1923.	1923.			Routed via. B. T. Co., San Francisco—A. T. S. F. Ry. Co.						
# 2-16	2-23	NYC	246308	Crockett	60456	86½	522.90	73	441.33	81.57
# 2-28	3- 6	AT	26875	Crockett	60450	86½	522.90	73	441.29	81.61
# 5- 9	5-15	AT	27269	Crockett	60450	86½	522.90	73	441.29	81.61
# 6- 1	6- 7	AT	32244	Crockett	61138	86½	528.84	73	446.31	82.53
# 6-14	6-19	AT	34050	Crockett	60751	86½	525.50	73	443.48	82.02
7-31	8- 7	AT	27200	Crockett	60717	86½	525.21	73	443.23	81.98
8- 9	8-15	AT	49701	Crockett	60717	86½	525.21	73	443.23	81.98
8-22	8-29	AT	48544	Crockett	83093	86½	718.75	73	606.58	112.17
9-28	10- 4	AT	38360	Crockett	60690	86½	524.79	73	443.04	81.93
12-14	12-19	NOTM	2480	Crockett	60781	86½	525.75	73	443.70	82.05

vs. Arizona Grocery Co.

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
1924.	1924.			Routed via. A. T. S. F. Ry. Co.						
2-20	2-26	AT	33637	Crockett	60882	84	511.41	73	444.44	66.97
3- 3	3- 7	AT	33848	Crockett	60986	84	512.29	73	445.20	67.09
5- 1	5- 6	AT	35949	Crockett	60966	84	512.12	73	445.05	67.07
6-28	7- 2	AT	63056	Crockett	60690	84	509.80	73	443.04	66.76
8-14	8-19	AT	31198	Crockett	60809	84	510.80	73	443.91	66.89
										1251.02

[11]

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via. S. P.—Bay Point—A. T. & S. F. Ry. Co.						
1923.	1923.									
# 4–30	5– 7	SP	35299	Crockett	60737	86½	525.38	73	443.38	82.00
#12–29	1924–1–4	DLW	38646	Crockett	60723	86½	525.25	73	443.28	81.97
1924.	1924.									
2– 3	2–11	SSW	25848	Crockett	60692	84	509.81	73	443.05	66.76
										230.55
										66.49
										297.04

#Carrier's records destroyed.

vs. Arizona Grocery Co.

Date Shipt.	Date of Collec'n	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via S. P.—Los Angeles—A. T. & S. F. Ry.						
2-20	2-28	CM&StP	92364	Spreckles	60450	84	507.78	73	441.29	66.49
					Totals		$26483.38		$22731.59	3751.79

With Accrued Interest.

THE ARIZONA COMPANY,
Claimants,
By ROLAND JOHNSTON,
Attorney.
Room 14, Arizona Fire Building,
Phoenix, Arizona, April 16, 1928.

The undersigned hereby certifies that this statement, which is issued in conformith with ICC Docket No. 16,742, AT&SF–CL Claim No. 133643–6, has been checked against the records of this Company and found correct. This certificate in so far as the Atchison, Topeka and Santa Fe Ry. Co. is concerned is made upon express understanding that it is not to be taken as an admission that the Commission's findings are correct, or that the complainant paid or bore the charges, or was damaged thereby, or is entitled to reparation.

(Signature Illegible.)
Auditor Coase Lines.

O. K.—[Initial Illegible.) [12]

EXHIBIT "B."

13146

INTERSTATE COMMERCE COMMISSION

No. 16742[1]

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928

Rates on sugar, in carloads, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and

[1] This report also comprises No. 16770, Bashford-Burmister Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company *v.* Same; No. 16770 (Sub-No. 2), Wheeler Perry Company *v.* Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti *v.* Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. *v.* Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), Babbitt Brothers Trading Company et al. *v.* Same; No. 16770 (Sub-No. 9), Wm. H. Dagg Mercantile Company *v.* Same; No. 17549, Phelps Dodge Mercantile Company *v.* Same; No. 17549 (Sub-No. 1), Baffert & Leon *v.* Same; No. 17466, United Verde Extension Mining Company *v.* Same; No. 17781, Simpson-Ashby Company *v.* Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company *v.* Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. *v.* Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports, 95 I. C. C. 244 and 101 I. C. C. 667.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and *R. S. Sawyer* for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and *Berne Levy* for defendants.

REPORT OF THE COMMISSION

CAMPBELL, *Chairman:*

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from (172) California, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925 and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respec-

tively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, *Phoenix Chamber of Commerce* v. *A., T. & S. F. Ry. Co.*, 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas, and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate, Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential of Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from California points to Bisbee, Douglas, Clifton, Tucson, and Clarkdale, Ariz., are alleged to have been and to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the

140 I. C. C.

time of the hearings traffic from California (173) moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San Francisco the present distances to Phoenix are, respectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length, which extends

from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In *Maier & Co.* v. *Southern Pacific Co.*, 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In *Fourth Section Violations in Rates on Sugar*, 31 I. C. C. 511, we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, which were lower than the rates concurrently applicable on like traffic to inter-

mediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso & Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition

140 I. C. C.

(174) to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates, with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In *Arizona Corporation Commission* v. *A., T. & S. F. Ry. Co.*, 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents minimum 36,000 pounds. On June 25, 1918, the main-line rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points became 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers cancelled the rates to main-line and branch-line points under the lower minimum weight published in connection with roads under Federal control and, as to such roads, increase the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in *Sugar from California Points to Arizona,* 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In *United Verde Mining Co.* v. *A., T. & S. F. Ry. Co.,* 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In *Sugar Cases of 1922,* 81 I. C. C. 448, fourth-section relief authorized in *Fourth Section Violations in Rates on Sugar, supra,* permitting lower

rates to Chicago, Ill., and other points in the Middle

(175) West than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, *Solomon-Wickersham Co.* v. *S. M. V. R. R. Co.*, 101 I. C. C. 667, reopened and here before us on argument, the rate on sugar from California points to Bowie was found to have been and to be unreasonable to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson, an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting

in rates of 80.5 and 85.5 cents, respectively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in *Arizona Corporation Commission* v. *A. E. R. R. Co.*, 113 I. C. C. 52, and will not be further discussed here. The latter case has since been reopened. In *Arizona Cattle Growers Asso.* v. *A. Ry. Co.*, 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on the basis of 71 cents, and contends that rates to the other destinations should be graded like (176)

the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Ox-

nard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in *Memphis-Southwestern Investigation*, 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents.

The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In *Oklahoma Traffic Asso.* v. *A. G. S. R. R. Co.*, 113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at destination. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain

varieties of sugar (177) not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing point	Quantity *Tons*	Producing point	Quantity *Tons*
Dyer	9,095	Tracy	8,297
Los Alamitos	2,010	Alvarado	9,580
Oxnard	15,310		
Betteravia	18,559	Total	92,917
Spreckles	30,066		

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land for-

merly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

	Northern California			Southern California		
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921	187	5,920	24	265	8,519	76
Year 1922	188	5,920	39.4	265	8,423	70.6
Year 1923	247	7,754	72.9	67	2,129	27.1
Year 1924	313	9,856	86	44	1,415	14
Year 1925	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3,029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern California. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckels and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a

breaking up of the present extensive (178) origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups, the northern group extending from San Francisco and Crockett on the north to Spreckels on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided *Consolidated Southwestern Cases,* 123 I. C. C. 203, in which new distance scales of rates were prescribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	*Cents*	*Cents*	*Miles*	*Cents*	*Cents*
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519	.....	.....	847	.....	.....
Prescott, Ariz.	526	.....	.....	782	.....	.....
Williams, Ariz.	527	.....	.....	783	.....	.....
Flagstaff, Ariz.	561	.....	.....	818	.....	.....
Clarkdale, Ariz.	563	.....	.....	820	.....	.....
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619	.....	.....	876	.....	.....
Bisbee, Ariz.	628	.....	.....	956	.....	.....
Bowie, Ariz.	634	.....	.....	961	.....	.....
Douglas Ariz.	643	.....	.....	971	.....	.....
Holbrook, Ariz.	652	.....	.....	909	.....	.....
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92.5
From Group 7 to—						
Gallup, N. Mex.	747	.....	.....	1,004	.....	.....
Clifton, Ariz.	753	.....	.....	1,081	.....	.....
Globe, Ariz.	758	.....	.....	1,085	.....	.....
Group average	752	64	79	1,057	74	95

(179) No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increase of 25 and 33⅓ per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Aubuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant as including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las Ani-

mas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the Colorado group named as defendant herein, carries rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670 (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923, six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in *Phoenix*

Chamber of Commerce (180) v. *Director General, supra,* referred to as the first Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which moved under

rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss* v. *Director General*, 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or

may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively, 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows:

140 I. C. C.

To—	From southern California group *Cents*	From northern California group *Cents*
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, N. Mex.	79	89
Clifton, Ariz.	79	89
Globe, Ariz.	79	89

We further find that complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, *Commissioner,* concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

Commissioner PORTER did not participate in the disposition of this case.

ORDERS

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

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No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

(I)

No. 16770 (Sub-No. 5)

Arizona Grocery Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 17549

Philps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

(II)

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its find-

ings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds:

To—	From southern California group *Cents*	From northern California group *Cents*
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84
Bisbee, Ariz.	72	84
Bowie, Ariz.	72	84
Douglas, Ariz.	72	84
Holbrook, Ariz.	72	84
Safford, Ariz.	75	87
Gallup, N. Mex.	79	90
Clifton, Ariz.	79	90
Globe, Ariz.	79	90

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 14449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

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No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, *Traffic Bureau of the Phoenix Chamber of Commerce et al.* v. *A., T. & S. F. Ry. Co. et al.*, and cases consolidated therewith and such oral argument having been had, and the commission having, on the date hereof, made and filed a new report containing its findings of fact

and conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and

101 I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in the southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall not exceed 72 cents per 100 pounds from the southern California group, as defined in the report of this date made a part hereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal.] GEORGE B. McGINTY,
Secretary.

(v)

U. S. Government printing office: 1928 [13]

EXHIBIT "C."

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1929

No. 16742

Traffic Bureau of Phoenix Chamber of Commerce, et al.,

v.

The Atchison, Topeka & Santa Fe Railway Company, et al.

It appearing, That on March 12, 1928, the commission entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainant is entitled to awards of reparation from the defendants named in the following table, in the amounts set opposite their respective names, with interest.

Defendants	Amounts
The Atchison, Topeka & Santa Fe Railway Company	$2,203.55
Bay Transport Company, and The Atchison, Topeka & Santa Fe Railway Company	1,251.02
Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company	297.04
Southern Pacific Company	2,104.58
Santa Maria Valley Railroad Company, and Southern Pacific Company	359.75

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby, authorized and directed to pay unto the complainant, Arizona Grocery company, on or before April 26, 1929, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of sugar, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex.

By the commission.

(Seal) GEORGE B. McGINTY,
Secretary. [14]

Endorsement on Complaint: Law-695 — Phx. Filed Oct 16, 1929. [15]

In the District Court of the United States, in and for the District of Arizona.

No. L.–696—PHOENIX.

AT LAW.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Defendants.

COMPLAINT.

Plaintiff by its attorneys, Elliott and Snell, complains of the defendants, and for its cause of action alleges:

I.

That at all times hereinafter mentioned plaintiff was a corporation organized under the laws of the State of Arizona and qualified to do business in said State of Arizona.

II.

That at all times hereinafter mentioned the defendants Southern Pacific Company and Santa Maria Valley Railroad Company were and now are railroad corporations engaged in the operation of railroads and railroad lines for the transportation of freight and interstate commerce, and the Santa Maria Valley Railroad Company is a

connecting carrier with the said defendant Southern Pacific Company, and between which there was an agreement for a joint line, and arrangements for a continuous carriage of interstate shipments over their respective lines.

III.

That between the 21st day of February, 1923, and [16] the 5th day of February, 1925, there was shipped by the above-named plaintiff to Phoenix, Arizona, over the lines of said defendants and entered Phoenix, Arizona, over the lines of said Southern Pacific Company, thirty-two (32) carloads of sugar. That the shipments originated at San Francisco, California; Crockett, California; Oxnard, California; and Betteravia, California, as shown on Exhibit "A" attached hereto and made a part hereof.

IV.

That the said defendant Southern Pacific Company charged this plaintiff, and this plaintiff was compelled to and did pay the said Southern Pacific Company upon all of said shipments from said points in California from the 21st day of February, 1923, to the 5th day of February, 1925, inclusive, the following freight charges, to wit:

From San Francisco, California; Oxnard, California; Crockett, California; and Betteravia, California, between the dates of February 21, 1923, to *the* including the 16th day of November, 1923, 86½ cents per hundred pounds; and from the 5th day of February, 1924, to the

4th day of February, 1925, inclusive, 84 cents per hundred pounds;

all as will more particularly appear from Exhibit "A" attached hereto and made a part hereof. That all of said shipments were made on through bills of lading from said points of origin to said points of destination, and that said freight charges as above set forth, per hundred pounds, were, and are unreasonable as to this plaintiff, and a violation of the Interstate Commerce Act of February 4, 1887, and Acts of Congress amendatory thereto, and that the just and reasonable freight rate which should have been charged on all of said shipments from Crockett, California, and San Francisco, California, to said points of destination, to wit, Phoenix, Arizona, after the date of July 1, 1922, was 73 cents per hundred pounds; and on all of said shipments from Oxnard, California, and Betteravia, California, [17] to said point of destination, to wit, Phoenix, Arizona, after the date of July 1, 1922, was 71 cents per hundred pounds.

V.

That prior to the filing of this complaint plaintiff filed its petition and complaint with and before the Interstate Commerce Commission of the United States alleging that the rates and charges on all of said shipments from said points of origin in California to said points of destination in Arizona were unjust and unreasonable as to the plaintiff and that thereafter the above-named defendants filed their answer with and before the Inter-

state Commerce Commission, said cause being docketed under said Docket No. 16742.

VI.

That said Interstate Commerce Commission, made, issued, and filed its findings of fact on the 12th day of March, 1928; that said Commission found that the said rates of 86½ cents and 84 cents per hundred pounds as above set forth on said shipments from said points of origin in California to said points of destination in Arizona were unreasonable as to the plaintiff to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on and after July 1, 1922, from Crockett, California, and San Francisco, California; and 71 cents per hundred pounds from Oxnard, California, and Betteravia, California, on and after July 1, 1922; and said Commission and said report and findings found that the plaintiff herein was entitled to reparations on all of said shipments from said points of origin in California to said points of destination in Arizona; and to interest thereon; copy of which report and findings of said Commission is attached hereto, marked Exhibit "B" and made a part hereof; and that said Commission required and directed that said complainants should comply with Rule V of the Rules and Regulations of the Interstate Commerce Commission, [18] which rule required a statement of the shipments and dates on which charges therefor were paid; the car initials and numbers; the points of origin; routes over which the shipments moved; the weights of shipments; the rates

charged; the amounts collected; the rates which should have been charged; the amounts which should have been collected; and differences between the charges existing and those which would have accrued upon the basis of rates found reasonable by the Commission; that in pursuance of said requirements of the Interstate Commerce Commission the plaintiff herein did on the 16th day of April, 1928, properly certify a statement under said Rule and transmitted same to the defendant Southern Pacific Company; and same was thereafter certified to by the Southern Pacific Company on the 17th day of September, 1928, and was thereafter transmitted by the Southern Pacific Company to the Interstate Commerce Commission; a copy of which statement is attached hereto marked Exhibit "A" and made a part hereof.

VII.

Thereafter on the 11th day of March, 1929, the Interstate Commerce Commission duly made and published its Order directing and requiring the defendants herein to pay unto said plaintiff Arizona Grocery Company, the following sums, to wit:

Southern Pacific Company $2,104.58

Southern Pacific Company and Santa Maria Valley Railroad Company 359.75

together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the charges shown on Exhibit "A" attached hereto and made a part hereof; the said sums to be paid on or before the 26th day of

April, 1929; said reparations being on account of the unreasonable rates charged for the transportation of certain carload shipments of sugar to points in Arizona from points [19] in California; as will more particularly appear from the copy of said order hereto attached, marked Exhibit "C" and made a part hereof.

VIII.

That said defendants have failed and refused to pay said reparation or any part thereof, either of principal or interest, though request and demand has heretofore been made by the plaintiff of the defendants for the payment of said reparations.

IX.

That by reason of said unreasonable rates and charges and the payment thereof by the plaintiff, and by reason of the refusal of said defendants to pay said reparations awarded by the Interstate Commerce Commission, the plaintiff has been damaged in the total sum of Twenty-four Hundred Sixty-four and 33/100 ($2,464.33) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the charges as shown in Exhibit "A" attached hereto and made a part hereof; no part of which has ever been paid.

X.

That the sum of One Thousand ($1,000.00) Dollars, which is a reasonable attorneys' fees, may be allowed by the Court in this action.

WHEREFORE, plaintiff demands judgment in its favor and against defendants for the sum of Twenty-four Hundred Sixty-four and 33/100 ($2,464.33) Dollars, together with interest thereon from the respective dates of payment as above set forth and as herein contained, together with One Thousand ($1,000.00) Dollars as attorneys' fees, and for plaintiff's costs and disbursements in this action; and plaintiff prays that process may issue herein.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [20]

88.98
66.93
22.03
66.76
22.02
44.74

Calculation checked by Shrafel 9-6-28.

CLAIM No. 805-1

EXHIBIT "A".

CLAIM No. 805-1 OF THE ARIZONA GROCERY COMPANY, UNDER THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN DOCKET No. 16742—ON SUGAR CARLOADS—DESTINATION, PHOENIX, ARIZONA.

Date Shipt.	Date Charges Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Route via Southern Pacific Company.						
1923 2-22	1923 3-1	CM&StP	87286	Crockett	60789	86½	525.82	73	443.76	82.06
3-13	3-20	GH&SA	50987	San Francisco	60896	86½	526.75	73	444.54	82.21

Date Shipt.	Date Charges Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Company.						
1923	1923									
3–20	3–28	SP	87745	San Francisco	60813	86½	526.03	73	443.93	82.10
4–25	5–2	SP	35005	San Francisco	60788	86½	525.82	73	443.75	82.07
5–12	5–19	SP	27309	San Francisco	60838	86½	526.25	73	444.12	82.13
6–27	7–10	SP	16940	San Francisco	81023	86½	700.85	73	591.47	109.38
9–14	9–20	SP	26505	Oxnard	60450	86½	522.89	71	429.20	93.69
9–19	9–26	SP	35048	San Francisco	60838	86½	526.25	73	444.12	82.13
10–11	10–18	SP	21533	Oxnard	60450	86½	522.89	71	429.20	93.69
1924	1924									
3–22	3–28	SP	16776	San Francisco	60450	84	507.78	71	429.20	78.58
2–5	2–12	CGW	29228	Oxnard	60750	84	510.30	73	443.48	66.82
2–29	4–9	SP	29047	San Francisco	60782	84	510.57	73	443.71	66.96
4–11	4–17	NYC	248647	San Francisco	60940	84	511.90	73	444.86	67.04

Date Shipt.	Date Charges Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Company.						
1924	1924									
6-14	6-20	NTC	51840	Crockett	60651	84	509.47	73	442.75	66.72
6-24	7-2	SP	28501	San Francisco	60964	84	512.10	73	445.04	67.06
6-25	7-2	SP	81424	Crockett	60678	84	509.70	73	442.95	66.75
8-16	8-25	Sou	135043	Crockett	60657	84	509.52	73	442.80	66.72
8-28	9-2	SP	16630	Crockett	60733	84	510.16	73	443.35	66.81
9-18	9-24	SP	81461	Crockett	60690	84	509.80	73	443.04	66.76
9-25	10-1	LW	32523	Crockett	60677	84	509.69	73	442.94	66.75
11-5	11-14	MK&T	68173	San Francisco	61253	84	514.53	73	447.15	67.38
11-13	11-18	SP	30000	Crockett	60679	84	509.70	73	442.96	66.74
12-1	12-8	SP	28487	Crockett	60640	84	509.38	73	442.67	66.71

[21]

Date Shipt.	Date Charges Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Co.						
1924	1924									
12–3	12–9	SP	30791	San Francisco	60669	84	509.62	73	442.88	66.74
12–15	12–22	SP	21267	Crockett	90707	84	761.94	73	662.16	99.78
1925	1925									
1–7	1–13	SP	29825	San Francisco	60983	84	512.25	73	445.18	67.07
1–14	1–19	SP	27862	San Francisco	60890	84	511.48	73	444.50	66.98
1–29	2–4	SSW	27113	Crockett	60676	84	509.68	73	42 93	66.75
					1751354					2104.58

Date Shipt.	Date Charges Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via S.M.V.RR.CO.—SP.CO						
1923	1923									
3-16	9-20	SP	16564	Betteravia	60450	86½	522.89	71	429.20	93.69
9-28	10-5	LW	32484	Betteravia	60450	86½	522.89	71	429.20	93.69
10-9	10-16	SP	87173	Betteravia	60450	86½	522.99	71	429.20	93.79
1924	1924									
6-16	6-23	GH	50670	Betteravia	60450	84	507.78	71	429.20	78.58
					241800					359.75
						Total—	16,929.67		14,465.44	2,464.23
						With accrued interest				2464.33

ARIZONA GROCERY COMPANY, Claimant.
By ROLAND JOHNSTON, Attorney,
Room 14—Arizona Fire Building,
Phoenix, Arizona, April 16, 1928.

The undersigned hereby certifies that the foregoing statement has been checked against the records of this company and found correct with respect to date of shipment, date of delivery or tender of delivery, date charges are paid, car initials and number, weight, rate and charges paid (except that shipments moving prior to September, 1924, are certified correct as shown only by attached freight bills, records covering this period having been destroyed).

SOUTHERN PACIFIC COMPANY,
Collecting Carrier, Defendant.
By [Initials Illegible.]
Auditor of Freight Accounts.
Sept. 17, 1928.

Checked by
SHRAFEL.
W. C. SEARS.
9/6/28.
(Balance of above stamp illegible.)
L. M. 9/14/28. [22]

EXHIBIT "B."

13146

INTERSTATE COMMERCE COMMISSION

No. 16742[1].

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928

Rates on sugar, in carloads, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports, 95 I. C. C. 244 and 101 I. C. C. 667.

[1]This report also comprises No. 16770, Bashford-Burmister Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company *v.* Same; No. 16770 (Sub-No. 2), Wheeler-Perry Company *v.* Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti *v.* Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. *v.* Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), Babbitt Brothers Trading Company et al. *v.* Same; No. 16770 (Sub-No. 9), Wm. H. Dagg Mercantile Company *v.* Same; No. 17459, Phelps Dodge Mercantile Company *v.* Same; No. 17549 (Sub-No. 1), Baffert & Leon *v.* Same; No. 17466, United Verde Extension Mining Company *v.* Same; No. 17781, Simpson-Ashby Company *v.* Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company *v.* Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. *v.* Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and *R. S. Sawyer* for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and *Berne Levy* for defendants.

REPORT OF THE COMMISSION

CAMPBELL, *Chairman:*

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from (172) California, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925 and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respectively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, *Phoenix*

Chamber of Commerce v. *A., T. & S. F. Ry. Co.*, 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas, and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate, Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential of Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from California points to Bisbee, Douglas, Clifton, Tucson, and Clarkdale, Ariz., are alleged to have been and to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the

record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the

time of the hearings traffic from California (173) moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San Francisco the present distances to Phoenix are, respectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length, which extends from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In *Maier & Co.* v. *Southern Pacific Co.*, 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In *Fourth Section Violations in Rates on Sugar*, 31 I. C. C. 511, we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, which were lower than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso

& Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition

(174) to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In *Arizona Corporation Commission* v. *A., T & S. F. Ry. Co.*, 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents minimum 36,000 pounds. On June 25, 1918, the main-line rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points became 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers cancelled the rates to main-line and branch-line points under the

lower minimum weight published in connection with roads under Federal control and, as to such roads, increase the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in *Sugar from California Points to Arizona,* 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In *United Verde Mining Co.* v. *A., T. & S. F. Ry. Co.,* 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In *Sugar Cases of 1922,* 81 I. C. C. 448, fourth-section relief authorized in *Fourth Section Violations in Rates on Sugar, supra,* permitting lower rates to Chicago, Ill., and other points in the Middle

(175) West than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, *Solomon-Wickersham Co.* v. *S. M. V. R. R. Co.*, 101 I. C. C. 667, reopened and here before us on argument, the rate on sugar from California points to Bowie was found to have been and to be unreasonable to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson, an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting in rates of 80.5 and 85.5 cents, respectively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in *Arizona Corporation Commission* v. *A. E. R. R. Co.*, 113 I. C. C. 52, and will be further discussed here. The latter case has since been reopened. In *Arizona Cattle Growers Asso.* v. *A. Ry. Co.*, 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on the basis of 71 cents, and contends that rates to the other destinations should be graded like (176)

the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Oxnard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The

principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in *Memphis-Southwestern Investigation,* 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents.

The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In *Oklahoma Traffic Asso.* v. *A. G. S. R. R. Co.,* 113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at desti-

nation. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain

varieties of sugar (177) not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing point	Quantity	Producing point	Quantity
	Tons		*Tons*
Dyer	9,095	Tracy	8,297
Los Alamitos	2,010	Alvarado	9,580
Oxnard	15,310		
Betteravia	18,559	Total	92,917
Spreckles	30,066		

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land for-

merly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

	Northern California			Southern California		
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921	187	5,920	24	265	8,519	76
Year 1922	188	5,920	39.4	265	8,423	70.6
Year 1923	247	7,754	72.9	67	2,129	27.1
Year 1924	313	9,856	86	44	1,415	14
Year 1925	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3,029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern California. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckles and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a breaking up of the present extensive (178)

140 I. C. C.

origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups, the northern group extending from San Francisco and Crockett on the north to Spreckles on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided *Consolidated Southwestern Cases*, 123 I. C. C. 203, in which new distance scales of rates were prescribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum

weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	*Cents*	*Cents*	*Miles*	*Cents*	*Cents*
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519	.....	.....	847	.....	.....
Prescott, Ariz.	526	.....	.....	782	.....	.....
Williams, Ariz.	527	.....	.....	783	.....	.....
Flagstaff, Ariz.	561	.....	.....	818	.....	.....
Clarkdale, Ariz.	563	.....	.....	820	.....	.....
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619	.....	.....	876	.....	.....
Bisbee, Ariz.	628	.....	.....	966	.....	.....
Bowie, Ariz.	634	.....	.....	961	.....	.....
Douglas Ariz.	643	.....	.....	971	.....	.....
Holbrook, Ariz.	652	.....	.....	909	.....	.....
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92
From Group 7 to—						
Gallup, N. Mex.	747	.....	.....	1,004	.....	.....
Clifton, Ariz.	753	.....	.....	1,081	.....	.....
Globe, Ariz.	758	.....	.....	1,085	.....	.....
Group average	752	64	79	1,057	74	95

(179) No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increases of 25 and 33⅓ per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Albuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant as including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las

Animas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the Colorado group named as defendant herein, carries rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670, (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923; six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in *Phoenix Chamber of Commerce* (180) v. *Director General, supra,* 140 I. C. C. referred to as the first Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which moved

under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss* v. *Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, ex-

ceed, or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively, 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows:

(181)

To—	From southern California group *Cents*	From northern California group *Cents*	To—	From southern California group *Cents*	From northern California group *Cents*
Yuma, Ariz.	46	66	Bisbee, Ariz.	72	84
Kingman, Ariz.	57	69	Bowie, Ariz.	72	84
Phoenix, Ariz.	61	73	Douglas, Ariz.	72	84
Tucson, Ariz.	65	77	Holbrook, Ariz.	72	84
Prescott, Ariz.	65	77	Safford, Ariz.	75	87
Williams, Ariz.	65	77	Gallup, N. Mex.	79	89
Flagstaff, Ariz.	65	77	Clifton, Ariz.	79	89
Clarkdale, Ariz.	65	77	Globe, Ariz.	79	89
Winslow, Ariz.	72	84			

We further find that the complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, *Commissioner,* concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

Commissioner PORTER did not participate in the disposition of this case.

ORDERS

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

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No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Maria Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

(I)

No. 16770 (Sub-No. 5)

Arizona Grocery Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 17549

Phelps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

(II)

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date

hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds:

To—	From southern California group *Cents*	From northern California group *Cents*
Yuma, Ariz.	46	66
Kingman, Ariz.	57	69
Phoenix, Ariz.	61	73
Tucson, Ariz.	65	77
Prescott, Ariz.	65	77
Williams, Ariz.	65	77
Flagstaff, Ariz.	65	77
Clarkdale, Ariz.	65	77
Winslow, Ariz.	72	84

To—	From southern California group *Cents*	From northern California group *Cents*
Bisbee, Ariz.	72	[illegible]
Bowie, Ariz.	72	[illegible]
Douglas, Ariz.	72	[illegible]
Holbrook, Ariz.	72	[illegible]
Safford, Ariz.	75	[illegible]
Gallup, N. Mex.	79	[illegible]
Clifton, Ariz.	79	[illegible]
Globe, Ariz.	79	[illegible]

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 14449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

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No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, *Traffic Bureau of the Phoenix Chamber of Commerce et al.*, v. *A., T. & S. F. Ry. Co. et al.*, and cases consolidated therewith, and such oral argument having been had, and the commission having, on the date hereof, made and filed a new report containing its findings of fact and

(IV)

conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and 101

I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California, to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in the southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and hereafter to abstain, from publshing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall not exceed 72 cents per 100 pounds from the southern California group, as defined in the report of this date made a part thereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

(V)

U. S. Government Printing Office: 1928 [23]

EXHIBIT "C."

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1929.

No. 16742.

Traffic Bureau of Phoenix Chamber of Commerce, et al.,

v.

The Atchison, Topeka & Santa Fe Railway Company, et al.

It appearing, That on March 12, 1928, the commission entered its report in the above entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainant is entitled to awards of reparation from the defendants named in the following table, in the amounts set opposite their respective names, with interest.

Defendants.	Amounts.
The Atchison, Topeka & Santa Fe Railway Company	$2,203.55
Bay Transport Company, and The Atchison, Topeka & Santa Fe Railway Company	1,251.02
Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company	297.04
Southern Pacific Company	2,104.58
Santa Maria Valley Railroad Company, and Southern Pacific Company	359.75

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby, authorized and directed to pay unto the complainant, Arizona Grocery Company, on or before April 26, 1929, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges *assaield* shown in the aforesaid agreed statements, as reparation in account of unreasonable rates charged for the transportation of numerous carloads of sugar, from California points to destinations in Arizona and from California and Colorado points to Gallup, N. Mex.

By the commission.

(Seal) GEORGE B. McGINTY,
Secretary. [24]

Endorsement on Complaint: Law–696—Phx. Filed Oct. 16, 1929. [25]

[Title of Court and Cause—No. L.-695—Phoenix.]

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix and County of Maricopa.

SUMMONS.

The President of the United States of America, GREETING: To Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, and *Souther* Pacific Company, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this county; or within thirty days of served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court of any other relief demanded in the complaint.

WITNESS: The Honorable JEREMIAH NETERER, Judge of said District Court, this 16th day of October, in the year of our Lord one thousand

nine hundred twenty-nine and of our Independence the one hundred and fifty-fourth.

[Seal of United States District Court, District of Arizona.]

C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk. [26]

Endorsement on foregoing Summons:

United States Marshal's Office,
District of Arizona.

I HEREBY CERTIFY that I received the within writ on the 25 day of Oct., 1929, and personally served the same on the 25 day of Oct., 1929, upon Atchison Topeka and Santa Fe Railway Company and Southern Pacific, a Corporation by delivering to, and leaving with L. H. Chalmers, attorney for A. T. & S. F. Ry. Co., L. B. Whitney of Baker & Whitney Attys. for S. P. Co., a Corp. Said defendant named therein personally, at the Maricopa County of ———— in said District, a certified copy thereof, together with a copy of the complaint, certified to by C. R. McFall attached thereto.

G. A. MAUK,
U. S. Marshal,
By A. E. Frankforter,
Office Deputy.

Oct. 25, 1929.

Filed Oct. 28, 1929. [27]

[Title of Court and Cause—No. L.-695—Phoenix.]

SUMMONS.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix and County of Maricopa.

The President of the United States of America, GREETING: To Bay Transport Company, a Corporation, Pier #38, San Francisco, California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within 20 days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS: The Honorable JEREMIAH NETERER, Judge of said District Court, this 16th day of October, in the year of our Lord one thousand

nine hundred and twenty-nine and of our Independence the one hundred and fifty-fourth.

[Seal United States District Court, District of Arizona]

C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk. [28]

Endorsement on the foregoing Summons:

UNITED STATES MARSHAL'S RETURN.

Returned unexecuted by request of Attorney Frank L. Snell, Jr.

FRED L. ESOLA,
United States Marshal,
Northern District of Calif.,
By Fred T. Field,
Deputy.

San Francisco, Calif., Dec. 5th, 1929.

Filed Dec. 9, 1929. [29]

[Title of Court and Cause—No. L.-696—Phoenix.]

SUMMONS.

Action brought in said District Court, and the Complaint filed in the office of Clerk of Said District Court, in the City of Phoenix and County of Maricopa.

The President of the United States of America, GREETING: To Southern Pacific Company and Santa Maria Valley Railroad Company, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the court for any other relief demanded in the complaint.

WITNESS: The Honorable JEREMIAH NETERER, Judge of said District Court, this 16th day of October, in the year of our Lord one thousand nine hundred and twenty-nine and of our Independence the one hundred and fifty-fourth.

[Seal of United States District Court, District of Arizona]

C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk. [30]

Endorsement on the foregoing summons:

United States Marshal's Office,
District of Arizona.

I HEREBY CERTIFY that I received the within writ on the 25 day of Oct., 1929, and personally served the same on the 25 day of Oct., 1929, upon Southern Pacific Company by delivering and

leaving with Louis B. Whitney, attorney for the Southern Pacific R. R. Co., said defendant named therein personally, at *the Phoenix,* County of Maricopa in said District, a certified copy thereof, together with a copy of the complaint, certified to by C. R. McFall attached thereto.

G. A. MAUK,
U. S. Marshal.
By A. E. Frankforter,
Office Deputy.

Oct. 25, 1929.
Filed Oct. 28, 1929. [31]

[Title of Court and Cause—No. L.-696—Phoenix.]

SUMMONS.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix, and County of Maricopa.

The President of the United States of America, GREETING: To Santa Maria Valley Railroad Company, a Corporation, Santa Maria, California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within 20 days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plain-

tiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS: The Honorable JEREMIAH NETERER, Judge of said District Court, this 16th day of October, in the year of our Lord one thousand nine hundred and twenty-nine and of our Independence the one hundred and fifty-fourth.

[Seal United States District Court, District of Arizona]

C. R. McFALL,
Clerk.
By Thos O. Bishop,
Deputy Clerk. [32]

Endorsement on the foregoing Summons:

United States Marshal's Office,
District of Arizona.

I HEREBY CERTIFY that I received the within writ on the 9th day of Nov. 1929, and personally served the same on the 9th day of November, 1929, upon Santa Maria Valley Railroad Co. by delivering to, and leaving with J. M. Davis, auditor of same said defendant named therein personally, at the county of Santa Barbara in said district, a certified copy thereof, together with a copy of the complaint, certified to by C. R. McFall attached thereto.

Marshal's Fees .....$ 2.00
Mileage Expenses $13.75

Total $15.75

A. C. SITTEL,
U. S. Marshal.
By Charles E. Rice,
Office Deputy.

November 9th, 1929.
Marshal's Civil Docket No. 10182.

Filed Nov. 16, 1929. [33]

[Title of Court and Cause—No. L.-695—Phoenix.]

DEMURRER.

Now come the defendants in the above-entitled action and demur to the complaint filed therein, and for ground of demurrer allege that said complaint does not, upon its face, set forth facts sufficient to constitute a cause of action.

Dated: November 25th, 1929.

BAKER & WHITNEY,
CHALMERS FENNEMORE & NAIRN,
Attorneys for Defendants.

E. W. CAMP,
JAMES E. LYONS,
JAMES BURTON MASON,
Counsel.

Copy received November 25, 1929.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

Filed Nov. 25, 1929. [34]

[Title of Court and Cause—No. L.-696—Phoenix.]

DEMURRER.

Now come the defendants in the above-entitled action and demur to the complaint filed therein, and for ground of demurrer allege that said complaint does not upon its face set forth facts sufficient to constitute a cause of action.

WHEREFORE, defendants pray that the complaint be dismissed and that they recover their costs in this case expended or incurred.

BAKER & WHITNEY,
317 Fleming Building, Phoenix, Arizona,
Attorneys for Defendants.

JAMES E. LYONS,
A. BURTON MASON,
San Francisco, California,
Of Counsel.

Received copy of the within this 25th day of November, 1929.

ELLIOTT & SNELL,
Attorney for Plaintiff.

Filed Nov. 25, 1929. [35]

[Title of Court and Cause—No. L.-695—Phoenix.]

ANSWER.

Now come the defendants in the above-entitled action and for their joint and several answer to the complaint filed therein admit, allege and deny as follows:

I.

They have no information and belief sufficient to enable them to answer the allegations contained in paragraph I of said complaint or any of them, and upon said grounds deny each and all of the allegations thereof.

II.

They admit the allegations of paragraphs numbered II, III, V, and VIII of said complaint.

III.

They admit the allegations of paragraph IV of said complaint except that they deny that said freight charges or any of them paid by plaintiffs were or was or are or is unreasonable or in violation of the Interstate Commerce Act [36] as alleged in said complaint, or otherwise, and defendants deny further that the just or reasonable freight rates which should have been charged upon any or all of the plaintiff's said shipments from Crockett or from San Francisco or from Spreckels to Phoenix, Arizona, or from either of said points of origin after July 1, 1922, was 73¢ per hundred pounds or any other sum less than the sum charged by these defendants.

IV.

Answering paragraph VI of said complaint defendants deny that the Interstate Commerce Commission found at any time that said rates of 86½¢ per hundred pounds and 84¢ per hundred pounds, or either of them, were or was unreasonable to the extent alleged or to any extent at all, but they admit that said Commission did undertake to find whether said rates had been unreasonable to the extent that they exceeded 73¢ per hundred pounds from Crockett, and from San Francisco, and from Spreckels, California, to Phoenix, but defendants allege that said finding was, as to plaintiff's shipments which had been made prior to the rendition and issuance of said decision, beyond the jurisdiction of said Commission and void, as is hereinafter more particularly set forth.

V.

Defendants admit that the Interstate Commerce Commission did undertake to make an order substantially as alleged in paragraph VII of said complaint, but defendants [37] allege that said order was beyond the jurisdiction of said Commission and without statutory or other authority as is hereinafter more particularly set forth.

VI.

Defendants deny each and all of the allegations contained in paragraph IX of said complaint.

VII.

Answering paragraph X of said complaint defendants deny that the sum of $1500.00 or any other

sum or amount whatsoever is or would be a reasonable attorney's fee to be allowed by the Court in this action.

VIII.

Defendants further show and allege that said orders of said Commission in so far as they authorize, direct or command payment of reparation upon the plaintiff's said shipments were and are beyond the power and jurisdiction of said Commission and without any warrant or authority whatsoever for the reason that the rates which were charged and collected upon plaintiff's said shipments as set forth in said complaint had previously been established and declared to be not unreasonable by said Commission after formal investigation, or were less in amount than rates which had been specifically prescribed and declared by said Commission to be reasonable after such formal investigation; and that said rates were charged and collected pursuant to the authority and approval of said Commission.

In that behalf defendants show that heretofore the [38] Traffic Bureau of the Phoenix Chamber of Commerce and certain other persons, firms and corporations as complainants instituted a proceeding before said Commission known as Docket 11,532, which said proceeding was duly heard by said Commission. In said docket said complainants attacked as unjust and unreasonable the rates on sugar in carloads from points in California to Phoenix, Arizona, including as points of origin San Francisco, Crockett, and Spreckels. After due hearing and investigation of said complaint said Commission made and rendered its report

and order dated June 22, 1921, and reported in Volume 62 of the official reports of said Commission at pages 412 and following, finding therein and thereby that the rates on sugar in carloads from points in California to Phoenix would for the future be unreasonable to the extent that they might exceed 96½¢ per hundred pounds, and ordering and directing that said rates be reduced for the future to a figure not exceeding said rate of 96½¢ per hundred pounds. And thereafter and on September 17, 1921, these defendants, together with certain other common carriers so engaged, voluntarily reduced said rate to 96¢ per hundred pounds, and that said last-mentioned rate was named in tariffs duly and regularly published and filed in accordance with law.

Said last-mentioned rate remained in effect until June 30, 1922, upon which date, in accordance with the recommendations made in a report of said Commission in a proceeding known as Docket 13,293, Reduced Rates, 1922, reported in Volume 68 of the Reports of said Commission, beginning at page 676, said rate was voluntarily reduced to 86½¢ per hundred pounds, and said last-mentioned rate was named in tariffs of said defendants and other carriers so engaged in interstate commerce, [39] duly and regularly filed with the Interstate Commerce Commission, and published in accordance with law.

Said last-mentioned rate remained in effect until on or about the 10th day of January, 1924; that on said last-mentioned date said rate was reduced to 84½¢ per hundred pounds in accordance with

recommendations made by said Commission in a proceeding entitled Sugar Cases of 1922, being Docket 13,098, decided on June 17, 1923, and reported in Volume 81 of said Commission's reports, beginning at page 448. That the said last-mentioned rate was duly and regularly established by these defendants and by other common carriers engaged in such commerce, and was named in tariffs duly and regularly published and filed in accordance with law.

That said last-mentioned rate remained in effect until February 25, 1925, upon which last-mentioned date said rate was reduced to 71¢ per hundred pounds, pursuant to and in compliance with a report and order of said Commission in a proceeding known as Docket 14,449, reported in Volume 95 of the reports of said Commission, beginning at page 244. In said last-mentioned proceeding the Traffic Bureau of the Phoenix Chamber of Commerce and certain corporations were complainants, and in said proceeding said complainants alleged that the rates on sugar from points in California to Phoenix were and in future would be unjust and unreasonable. In said last-mentioned proceeding, Docket 14,449, said Commission found and decided that said rates from California points to Phoenix had been unreasonable in the past to the extent that they exceeded 79¢ per hundred pounds before July 1, 1922, and 71¢ per hundred pounds subsequent to that date, and undertook to award reparation on shipments made by complainants in said proceeding to the extent that the charges [40] collected exceeded those which would have accrued at said rate

so declared to have been reasonable; and further required defendants in said proceeding, including these defendants and certain other common carriers by rail, to establish and maintain for the future rates not exceeding 71 cents per hundred pounds from said points of origin to Phoenix. Said last-mentioned rate was duly established in compliance with said order on February 25, 1925, as above set forth.

Thereafter said Commission reopened said proceeding Docket 14,449 in so far as its orders therein purported to award reparation and consolidating the same with a subsequent proceeding brought by the Traffic Bureau of Phoenix Chamber of Commerce and certain other persons, firms and corporations as complainants, known as Docket 16,742, which last-mentioned proceeding is referred to at length in the complaint of the plaintiff herein, and particularly in paragraphs V and VI thereof. Said proceeding resulted in the purported order on which the complaint herein is based.

IX.

Defendants allege and show that said order of said Commission, dated the 11th day of March, 1929, and purporting to order and direct these defendants to pay reparation to plaintiff upon said shipments set forth and referred to in Exhibit "A" annexed to said complaint, is null and void and of no effect, in that said Commission was and is without lawful jurisdiction and authority to make said order, for the following reasons, to wit:

(1) Said order purports to be issued pursuant to authority and jurisdiction conferred upon said Commission by the Interstate Commerce Act; but said Act does not vest said Commission [41] with jurisdiction and authority to award reparation with respect to charges collected upon the basis of rates which said Commission has theretofore specifically prescribed or approved as reasonable and just for the future by a continuing order or with respect to charges collected upon the basis of rates which are less in amount than rates so prescribed and/or approved as just and reasonable.

(2) If said Act is so construed as to vest such jurisdiction and authority in said Commission, it is to that extent unconstitutional, and any and all orders made in pursuance of said purported jurisdiction are likewise unconstitutional and void, because contrary to and forbidden by the 5th Amendment to the Constitution of the United States, and particularly those portions thereof which guarantee that no person shall be deprived of his property without due process of law, in that said order purports to condemn as unlawful and to award damages with respect to acts which, at the time of their performance, were lawful and expressly sanctioned by previous formal continuing orders of said Commission.

(3) Said order is based upon a mistake of law, in that the Commission has erroneously assumed jurisdiction which it does not possess.

(4) Said order is arbitrary and unjust, and contrary to the evidence in that it purports to award

damages for the collection of lawful tariff rates which were admittedly prescribed and established as just and reasonable by the Commission itself, or which were materially lower than the maximum reasonable rates so authorized and approved.

(5) Said order proceeds from the exercise of authority by the Commission in such an unreasonable, arbitrary and capricious manner as to cause it to be invalid, amounting to a [42] denial of the due process of law as guaranteed by the aforesaid 5th amendment.

(6th) Said order constitutes a collateral retroactive reversal of orders heretofore duly and regularly entered and made by said Commission, pursuant to its lawful jurisdiction and authority, which said collateral retroactive reversal is forbidden by, and contrary to, the provisions of the Interstate Commerce Act.

WHEREFORE, defendants allege and show that the Interstate Commerce Commission was and is without jurisdiction or statutory authority to order these defendants or any of them to pay reparation on account of rates or either of them so charged and collected, and that said alleged order of said Commission purporting to authorize and direct defendants to pay reparations to the plaintiff on account of said rates or any of them, is void and of no effect, and these defendants pray that the complaint be dismissed and that they be allowed their costs incurred herein.

Dated November 25th, 1929.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

E. W. CAMP,
JAMES E. LYONS,
JAMES BURTON MASON,
Counsel.

Copy received Nov. 25, 1929.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

Filed Nov. 25, 1929. [43]

[Title of Court and Cause—No. L.-696—Phoenix.]

ANSWER TO COMPLAINT.

Now comes the defendants in the above-entitled action, and, for their joint and several answer to the complaint on file therein, admit, allege, and deny as follows:

I.

Allege that they have no information or belief sufficient to enable them to answer the allegations of paragraph I of said complaint, and upon said grounds they deny each and all of the allegations thereof.

II.

Said defendants admit the allegations of paragraphs II, III, V, and VIII, of said complaint.

III.

Said defendants admit the allegations of paragraph IV of said complaint, except that they deny that said freight charges of 86½ cents per 100 pounds, and 84 cents per 100 pounds, or either of them, were or was, or are or is, unreasonable as to the plaintiff, or in violation of the Interstate Commerce Act, as alleged in said complaint, or to any extent; and said defendants deny further that the just and/or reasonable freight rates which should have been charged upon any or all of plaintiff's said shipments from Crockett, California, [44] and San Francisco, California, to Phoenix, Arizona, or from either of said points of origin, after July 1, 1922, was 73 cents per 100 pounds, or that the just and/or reasonable freight rate which should have been charged upon any or all of plaintiff's said shipments from Oxnard, California, and/or Betteravia, California, or from either of said points of origin, to Phoenix, Arizona, after July 1, 1922, was 71 cents per 100 pounds, or that the just and/or reasonable freight rate which should have been charged upon all or any of plaintiff's said shipments was any other sum or rate than the lawful tariff rates which were severally applicable and which were charged upon each of said respective shipments.

IV.

Answering paragraph VI of said complaint, defendants deny that the Interstate Commerce Commission found at any time that said rates of 86½ cents per 100 pounds and 84 cents per 100 pounds, or

either of them, were or was unreasonable as to the plaintiff to the extent alleged, or to any extent at all; but they admit that said Interstate Commerce Commission did undertake to find whether said rates had been unreasonable to the extent that they exceeded 73 cents per 100 pounds from Crockett, California, and San Francisco, California, to Phoenix, Arizona, and 71 cents per 100 pounds from Oxnard, California, and Betteravia, California, to Phoenix, Arizona, but defendants allege that said finding was, as to plaintiff's shipments which had been made prior to the rendition and issuance of said decision, beyond the jurisdiction of said Commission and void, as in hereinafter more particularly set forth.

V.

Said defendants admit that, substantially as alleged in paragraph VII of said complaint, the Interstate Commerce Commission [45] did undertake to make an order as alleged in said paragraph; but defendants allege that said order was beyond the jurisdiction of said Commission, and without statutory authority, as is hereinafter more particularly set forth.

VI.

Said defendants deny each and all of the allegations contained and set forth in paragraph IX of said complaint.

VII.

Answering paragraph X of said complaint, said defendants deny that the sum of $1,000.00, or any other sum or amount whatsoever, is a reasonable

attorney's fee to be allowed by the court in this action.

VIII.

Defendants further show and allege that said orders of said Interstate Commerce Commission, in so far as they authorize direct and/or command payment of reparation upon the plaintiff's said shipments, were and are beyond the power and jurisdiction of said Commission, and without any statutory warrant or authority whatsoever, for the reason that the rates which were charged and collected upon plaintiff's said shipments, as set forth in said complaint, had previously been established by and declared to be reasonable by said Commission, after formal investigation, and/or were less in amount than rates which had been specifically prescribed and declared by said Commission to be reasonable, after such formal investigation; and that said rates were charged and collected pursuant to the authority and approval of said Commission.

In that behalf defendants show that heretofore the traffic Bureau of the Phoenix Chamber of Commerce and certain other persons, firms, corporations, as complainants, instituted a proceeding before said Commission known as Docket No. [46] 11,532, which said proceeding was duly heard by said Commission in said Docket No. 11,532, said complainants attacked as unjust and unreasonable the rates on sugar, in carloads, from points in California to Phoenix, Arizona. After due hearing and investigation of said complaint, said Commission made and rendered its opinion and order, dated June 22, 1921,

and reported in Volume 62 of the official reports of said Commission, at pages 412, and following finding that the rates on sugar, in carloads, from points in California to Phoenix, Arizona, would for the future be unreasonable to the extent that they might exceed 96½ cents per 100 pounds, and ordering and directing that said rates be reduced for the future, until the further order of the Commission, to a figure not exceeding said rate of 96½ cents per 100 pounds; and that thereafter, these defendants, together with other common carriers engaged in interstate commerce, duly and regularly filed and published tariffs effective September 17, 1921, naming a rate of 96 cents per 100 pounds, or one-half cent less than the maximum rate prescribed and authorized by said Commission; that said rate of 96 cents per 100 pounds was named in tariffs duly and regularly published and filed, with the Interstate Commerce Commission in accordance with the law.

That said rate of 96 cents per 100 pounds remained in effect until on or about July 1st, 1922, upon which date, in accordance with the recommendations made in a report of said Interstate Commerce Commission in a proceedings known as Docket No. 13,293, Reduced Rates, 1922, reported in Volume 68 of the official reports of the Interstate Commerce Commission beginning at page 676, said rate was again voluntarily reduced to 86½ cents per 100 pounds; that said last mentioned rate of 86½ cents per 100 pounds was named in tariffs of said defendants [47] and other carriers engaged in interstate commerce, duly and regularly

filed with the Interstate Commerce Commission in accordance with law.

That said last mentioned rate of 86½ cents per 100 pounds remained in effect until or about the 10th day of January, 1924; on which date said rate of 86½ cents per 100 pounds was again voluntarily reduced to 84 cents per 100 pounds; that the said last mentioned rate was duly and regularly established by these defendants, and by other common carriers engaged in interstate commerce, and was named in tariffs duly and regularly published and filed with the Interstate Commerce Commission in accordance with law.

That said last mentioned rate of 84 cents per 100 pounds remained in effect until February 25, 1925; that upon said last mentioned date said rate of 84 cents per 100 pounds was reduced to 71 cents per 100 pounds, pursuant to and in compliance with the findings and order of said Commission in a proceeding known as Docket No. 14,449, reported in Volume No. 95 of the official reports of said Commission, at pages 244 and following, in which the Traffic Bureau of the Phoenix Chamber of Commerce and certain corporations were complainants, and in which said proceeding said complainants alleged that the rates on sugar from points in California to Phoenix, Arizona, were and in the future would be unjust and unreasonable. In said last mentioned proceeding, Docket No. 14,449, said Commission found and decided that said rates from all California points to Phoenix had been unreasonable in the past to the extent that they exceeded 79 cents

per 100 pounds prior to July 1, 1922, and 71 cents per 100 pounds subsequent to that date, and undertook to award reparation on shipments made by the complainants in said proceeding to the extent that the charges collected thereon exceeded those which [48] would have accrued at said rates declared to have been reasonable; and further required the defendants in said proceeding, including these defendants, and certain other common carriers by rail in interstate commerce, to establish and maintain for the future rates not exceeding 71 cents per 100 pounds from all points in California to Phoenix, Arizona, that said last mentioned rate of 71 cents per 100 pounds was duly established, in compliance with said order, on February 25, 1925, as above set forth.

That thereafter said Interstate Commerce Commission reopened said proceeding, Docket No. 14,449, in so far as its orders therein purported to award reparation, and consolidated the same with a subsequent proceeding brought by the Traffic Bureau of the Phoenix Chamber of Commerce, and certain other persons, firms and corporations, as complainants, known as Docket No. 16,742; which said last mentioned proceeding is referred to at length in the complaint of the plaintiff herein, and particularly in paragraphs V and VI thereof; said proceeding resulted in the purported order upon which the complaint herein is based.

IX.

Defendants allege and show that said order of said Commission, dated the 11th day of March, 1929,

and purporting to order and direct these defendants to pay reparation to plaintiff upon said shipments set forth and referred to in Exhibit "A" annexed to said complaint, is null and void and of no effect, in that said Commission was and is without lawful jurisdiction and authority to make said order, for the following reasons, to wit:

(1) Said order purports to be issued pursuant to authority and jurisdiction conferred upon said Commission by the Interstate Commerce Act; but said Act does not vest said Commission with jurisdiction and authority to award reparation [49] with respect to charges collected upon the basis of rates which said Commission has theretofore specifically prescribed or approved as reasonable and just for the future by a continuing order or with respect to charges collected upon the basis of rates which are less in amount than rates so prescribed and/or approved as just and reasonable.

(2) If said Act is so construed as to vest such jurisdiction and authority in said Commission, it is to that extent unconstitutional, and any and all orders made in pursuance of said purported jurisdiction are likewise unconstitutional and void, because contrary to and forbidden by the 5th Amendment to the Constitution of the United States, and particularly those portions thereof which guarantee that no person shall be deprived of his property without due process of law, in that said order purports to condemn as unlawful and to award damages with respect to act which, at the time of their performance, were lawful, and expressly sanctioned

by previous formal continuing orders of said Commission.

(3) Said order is based upon a mistake of law, in that the Commission has erroneously assumed jurisdiction which it does not possess.

(4) Said order is arbitrary and unjust, and contrary to the evidence, in that it purports to award damages for the collection of lawful tariff rates which were admittedly prescribed and established as just and reasonable by the Commission itself, or which were materially lower than the maximum reasonable rates so authorized and approved.

(5) Said order proceeds from the exercise of authority by the Commission in such an unreasonable, arbitrary and capricious manner as to cause it to be invalid, amounting to a denial of due process of law as guaranteed by the aforesaid [50] 5th amendment.

(6) Said order constitutes a collateral retroactive reversal of orders heretofore duly and regularly entered and made by said Commission, pursuant to its lawful jurisdiction and authority, which said collateral retroactive reversal is forbidden by, and contrary to, the provisions of the Interstate Commerce Act.

WHEREFORE, defendants allege and show that the Interstate Commerce Commission was and is without jurisdiction or statutory authority to order these defendants, or either of them, to pay reparation on account of the rates, or either of them, so charged and collected; and that said alleged order of said Interstate Commerce Commission purport-

ing to authorize and direct said defendants to pay reparation to the plaintiff on account of said rates, or either of them, is void, and of no effect; and these defendants pray that the complaint be dismissed, and that they be allowed their costs incurred herein.

BAKER & WHITNEY,
Attorneys for Defendants.

JAMES E. LYONS,
A. BURTON MASON,
Of Counsel.

Received copy of the within this 25th day of November, 1929.

ELLIOTT & SNELL,
Attorneys for Plaintiffs.

Filed Nov. 25, 1929. [51]

[Title of Court and Cause—No. L.-695—Phoenix.]

STIPULATION FOR CONSOLIDATION OF CAUSES.

Comes now the above-named plaintiff and defendants by their respective attorneys and waive a jury in the above-entitled cause.

IT IS FURTHER HEREBY STIPULATED AND AGREED that the above-entitled cause, and cause No. L.-696—Phoenix, entitled Arizona Grocery Company, a Corporation, Plaintiff, vs. Southern Pacific Company, a Corporation, and Santa Maria Valley Railroad Company, a Corporation, Defendants, may be tried together.

Dated this 7th day of January, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jan. 8, 1930. [91]

[Title of Court and Cause—No. L.-696—Phoenix.]

STIPULATION FOR CONSOLIDATION OF CAUSES.

Comes now the above-named plaintiff and defendants by their respectve attorneys and waive a jury in the above-entitled cause.

IT IS FURTHER HEREBY STIPULATED AND AGREED that the above-entitled cause, and cause No. L.-695, entitled Arizona Grocery Company, a Corporation, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, a Corporation, Bay Transport Company, a Corporation, and Southern Pacific Company, a Corporation, Defendants, may be tried together.

Dated this 7th day of January, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jan. 8, 1930. [92]

[Title of Court and Cause—No. L.-695—Phoenix.]

REQUEST FOR SPECIAL FINDINGS.

Now comes the defendants above named by their counsel and request the Court to make, enter, and file, in the above-entitled action special findings of fact prior to rendering judgment.

Dated, this 7th day of January, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jan. 8, 1930. [93]

[Title of Court and Cause—No. L.-696—Phoenix.]

REQUEST FOR SPECIAL FINDINGS.

Now comes the defendants above named by their counsel and request the Court to make, enter, and file, in the above-entitled action special findings of fact prior to rendering judgment.

Dated, this 7th day of January, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jan. 8, 1930. [94]

[Title of Court and Cause—Nos. L.-695, L.-696—Phoenix.]

STIPULATION FOR PROCEDURE.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled actions, and by and between their respective attorneys and counsel that:

1. The foregoing actions shall be submitted to the trial court for decision upon the record in said actions, as made by the filing of the agreed statement of facts executed by the parties under date of January 8, 1930, and by the introduction in evidence of the order of the Interstate Commerce Commission in I. C. C. Docket No. 16,742, under date of March 11, 1929 (a copy of said order being annexed to each of the complaints herein and marked Exhibit "C"), and upon argument of counsel upon the record as so made.

2. In the event that said court shall decide that upon the record as so made, judgments in said causes should be entered in favor of the defendants, plaintiff shall have [95] the right, within ten days after notice of such decision, to serve and file a motion for a further hearing of said causes, for the purpose of offering testimony on behalf of plaintiff respecting the reasonableness, at the times of their assessment, of the rates assessed and collected upon plaintiff's shipments referred to in detail upon the statements annexed to the complaints in said causes and marked Exhibit "A."

3. Defendants will not oppose such motion for further hearing, but shall have the right to make objection to any and all of such further testimony upon any and all grounds which may seem proper to them.

4. In the event that the court shall decide, upon the record as made, that judgments should be entered for the plaintiffs in said causes, either party shall have the right upon ten days' notice, and as soon thereafter as the issue may be heard, to introduce testimony respecting the amount of the attorneys' fees to be allowed by the court to plaintiffs' attorney and counsel.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jan. 8, 1930. [96]

[Title of Court and Cause—No. L.-695—Phoenix.]

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the plaintiff, above mentioned, by its attorneys, Elliott and Snell, and hereby requests the Court to make the following findings of fact and conclusions of law in this action.

Dated this 27th day of June, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [103]

[Title of Court and Cause—No. L.-695—Phoenix.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on for trial at the regular term of said court, and on the 8th day of January, 1930, and having been tried by the Court, a jury trial having been legally waived by the respective parties hereto, plaintiff appearing by its attorneys, [104] Elliott and Snell, and the defendants appearing by their attorneys, Baker and Whitney, Chalmers, Fennemore and Nairn, and R. W. Camp, James E. Lyon, and James Burton Mason, of Counsel; plaintiff and defendants by and through their respective attorneys having filed with the Court a written agreed statement of certain facts and the respective parties having offered both oral and documentory evidence in support of their respective pleadings herein, and the Court, after hearing the evidence, the argument of counsel and having considered the agreed statement of facts, and being fully advised in the premises does hereby make and file the following as its findings of fact and conclusions of law, constituting the decision of the court in this action:

FINDINGS OF FACT.

1.

That the plaintiff is and was at all times mentioned in plaintiff's complaint a corporation or-

ganized under the laws of the State of Arizona and qualified to do business in said State [105] of Arizona.

2.

That at all times mentioned in plaintiff's complaint, the defendants, Atchison, Topeka and Santa Fe Railroad and the Southern Pacific Company were and now are railroad corporations engaged in the operation of railroads and railroad lines, and that the defendant, Bay Transport*ation* Company was and now is a water transportation line, and that all of said defendants were and now are engaged in the transportation of freight and Interstate Commerce, and that the Bay Transport*ation* Company and the Southern Pacific Company were and now are connecting carriers with the defendant, Atchison, Topeka and Santa Fe Railroad Company, and that there was and is between said defendants an agreement for a joint line and arrangements for a continuous carriage of interstate commerce over their respective lines.

3.

That between the 6th day of February, 1923, and the 10th day of February, 1925, there [106] was shipped by the plaintiff, Arizona Grocery Company, to Phoenix, Arizona, over the lines of the said defendants and entered Phoenix, Arizona, over the lines of the Atchison, Topeka & Santa Fe Railroad Company, 50 carloads of sugar.

That the said shipments originated at San Francisco, California, Crockett, California, and

Spreckels, California, all as shown on Exhibit "A," attached to plaintiff's complaint.

4.

That the defendant, Atchison, Topeka & Santa Fe Railroad Company charged the plaintiff, Arizona Grocery Company and the Arizona Grocery Company was compelled to and did pay the said Atchison, Topeka & Santa Fe Railroad Company upon all of said shipments from said points in California from the 6th day of February, 1923, to the 10th day of February, 1925, inclusive, the following freight charges, to wit:

From San Francisco, California, between the dates of February 24, 1923, to the 7th day of January, 1924, inclusive, 86½¢ per hundred pounds, and from the 11th day of January, 1924, [107] to the 10th day of February, 1925, 84 cents per hundred pounds.

From Crockett, California, between the dates of February 16, 1923, to the 4th day of January, 1924, 86½¢ per hundred pounds, and from the 3rd day of February, 1924, to the 19th day of August, 1924, 84 cents per hundred pounds.

From Spreckels, California, on the one shipment from said point, as shown on Exhibit "A" attached hereto, and received by the plaintiff on the 28th day of February, 1924, 84 cents per building pounds.

That all of said shipments were made on through bills of lading from said points of origin to the said point of destination, to wit: Phoenix, Arizona.

And that said freight charges as above set forth, per hundred pounds, were and are unreasonable to the plaintiff and in violation of the interstate Commerce Act of February 4, 1887, and the acts of Congress amendatory thereto.

That the just and reasonable freight rate which should have been charged on all of said shipments from said points of origin in California to [108] said point of destination in Arizona after the 1st day of July, 1922, and up to *an* including the 10th day of February, 1925, was 75 cents per hundred pounds.

5.

That the plaintiff prior to the commencement of this action filed its petition and complaint with and before the Interstate Commerce Commission of the United States, alleging that the rates and charges on the above-mentioned shipments were unjust and unreasonable as to the plaintiff, and that thereafter the defendants filed their answer with and before the Interstate Commerce Commission. That said matter was docketed before the Interstate Commerce Commission under docket No. 16,742.

6.

That the Interstate Commerce Commission issued and filed its findings of fact in said matter on the 12th day of March, 1928.

That said Commission found that the said rate of 86½ cents and 84 cents per hundred [109] pounds as above mentioned on said shipments were unreasonable as to the plaintiff to the extent that they exceeded a rate and charge of 73 cents per

hundred pounds on and after July 1, 1922, up to and including the 10th day of February, 1925.

And that said report and findings found that the plaintiff was entitled to reparations on all of said shipments and to interest thereon.

That the plaintiff did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations.

7.

And on the 11th day of March, 1929, the Interstate Commerce Commission duly made and published its order directing and requiring the defendants herein to pay to the plaintiff the following sums, to wit:

Atchison, Topeka and Santa Fe R. R. Co. . . $2203.55
Atchison, Topeka and Santa Fe R. R. Co. and Bay Transport Company 1521.02
Atchison, Topeka and Santa Fe R. R. Co. and Southern Pacific Company 297.04

[110]

together with interest thereon at the rate of 6% per annum from the respective dates of payment of the charges by the defendants; said sums to be paid on or before the 26th day of April, 1929; said sums being reparation on account of the unreasonable rates charged for the transportation of said carload shipments of sugar.

8.

That the defendants failed and refused to comply with said order and to pay said reparation or any

part thereof, though request and demand was properly made by the plaintiff for the payment of same.

9.

That by reason of said unreasonable rates and charges and payment thereof by the plaintiff and by reason of the refusal of the defendants to pay said reparation so awarded by the Interstate Commerce Commission, plaintiff is damaged in the total sum of $3,751.61, together with interest thereon at the rate of 6% [111] per annum from the respective dates of payment.

10.

That the plaintiff was required to employ attorneys at law to prosecute the present action in order to effect collection of said reparation and that 20% of the total amount due including interest and principal is reasonable as attorneys' fees. [112]

CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Court finds as conclusions of law, as follows:

1.

That the order of the Interstate Commerce Commission, dated March 11, 1929, and made and entered in that certain proceeding before said Commission entitled Traffic Bureau of Phoenix Chamber of Commerce et al. vs. A. T. & S. F. Railroad Company et al., Docket No. 16742, which order required said defendants to pay to the plaintiff herein certain sums of money, as set forth in said order and in plaintiff's complaint, was and is a legal, valid, and binding order and was made and entered

by said Interstate Commerce Commission in said cause and was within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said order the said Interstate Commerce Commission acted [113] within its jurisdiction and power.

2.

That the rates of 86½ cents and 84 cents per hundred pounds charged the plaintiff by the defendants between the 6th day of February, 1923, and the 10th day of February, 1925, on shipments of fifty carloads of sugar originating at San Francisco, Crockett, and Spreckels in the State of California, as shown on Exhibit "A," attached to plaintiff's complaint, were, as found by the Interstate Commerce Commission in said proceeding unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds after July 1, 1922, up to and including the 10th day of February, 1925, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines was 73 cents per hundred pounds between said dates.

3.

That by reason of said unreasonable charges the plaintiff has been damaged and the defendants, and each of them, became and are jointly and severally indebted to the plaintiff in the sum of $3,751.61, principal, together with interest at the rate of six per cent per annum from [114] the respective dates of payment of the charges as shown on Exhibit "A" attached to plaintiff's complaint, amount-

ing to the sum of $1,444.14, and attorneys' fees of 20% of the total amount of said indebtedness, including principal and interest, amounting to the sum of $1,039.19, together with the other lawful costs incurred by plaintiff in this action, and that plaintiff is entitled to judgment therefor.

Done and dated this —— day of ——, 1930.

_____,

Judge.

The receipt of a copy of the within instrument acknowledged this 27 day of June, 1930.

BAKER & WHITNEY and
CHALMERS FENNEMORE & NAIRN,
Attorneys for Plaintiff.

Filed Jun. 27, 1930. [115]

[Title of Court and Cause—No. L.-696—Phoenix.]

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the plaintiff, above mentioned, by its attorneys, Elliott and Snell, and hereby requests the Court to make the following findings of fact and conclusions of law in this action.

Dated this 27th day of June, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [116]

[Title of Court and Cause—No. L.-696—Phoenix.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on for trial at the regular term of said court, and on the 8th day of June, 1930, and having been tried by the Court, a jury trial having been legally waived by the respective parties hereto, plaintiff appearing by its attorneys, Elliott and Snell, and the defendants appearing by their attorneys, Baker, and Whitney, Chalmers, Fennemore and Nairn, and E. W. Camp, James E. Lyon, and James Burton Mason, of counsel; plaintiff and defendants by and through their respective attorneys having filed with the Court a written agreed statement of certain facts and the respective parties having offered both oral and documentory [117] evidence in support of their respective pleadings herein, and the Court, after hearing the evidence, the argument of counsel and having considered the agreed statement of facts, and being fully advised in the premises does hereby make and file the following as its findings of fact and conclusions of law, constituting the decision of the Court in this action:

FINDINGS OF FACT.

1.

That the plaintiff is and was at all times mentioned in plaintiff's complaint a corporation organized under the laws of the State of Arizona

and qualified to do business in said State of Arizona.

2.

That at all times mentioned in plaintiff's complaint, the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, were and now are railroad corporations engaged in the operation [118] of railroad lines for the transportation of freight and Interstate Commerce, and the Santa Maria Valley Railroad Company is and was at all times mentioned in plaintiff's complaint a connecting carrier with the said defendants, Southern Pacific Company, and between which there was an agreement for a joint line and arrangements for a continuous carriage of interstate commerce shipments over their respective lines.

3.

That between the 21st day of Februray, 1923, and the 5th day of February, 1925, inclusive, there was shipped by the plaintiff, Arizona Grocery Company to Phoenix, Arizona, over the lines of the said defendants and entered Phoenix, Arizona, over the lines of the Southern Pacific Company thirty-two carloads of sugar.

That the shipments originated at San Francisco, California, Crockett, California, Oxnard, California, and Betteravia, California, all as shown on Exhibit "A" attached to plaintiff's complaint.

4.

That the defendant, Southern Pacific [119] Company, charged the plaintiff, Arizona Grocery

Company and the Arizona Grocery Company was compelled to and did pay the said Southern Pacific Company upon all of said shipments from said points in California, from the 21st day of February, 1923, to the 5th day of February, 1925, inclusive, the following freight charges, to wit:

From San Francisco, California, Oxnard, California, Crockett, California, Betteravia, California, between the dates of February 21, 1923, to and including the 16th of November, 1923, 86½ cents per hundred pounds.

And from the 5th day of February, 1924, to the 4th day of February, 1925, inclusive, 84 *cent* per hundred pounds.

That all of said shipments were made on through bills of lading from said points of origin to said point of destination, to wit, Phoenix.

And that said freight charges as above set forth per hundred pounds were and are unreasonable to the plaintiff and in violation of the Interstate Commerce Act of February 4, 1885, and the Acts of Congress amendatory thereto.

That the just and reasonable freight rate which should have been charged on all of said shipments from Crockett, California, and San Francisco, [120] California, to said point of destination, to wit; Phoenix, Arizona, after the date of July 1, 1922, and up to and including the 5th day of February, 1925, was 73 cents per hundred pounds; and on all of said shipments from Oxnard and Betteravia, California, to said point of destination, to wit; Phoenix, Arizona, after the first day of July, 1922,

and up to and including the 5th day of February, 1925, was 71 cents per hundred pounds.

5.

That the plaintiff prior to the commencement of this action filed its petition and complaint with and before the Interstate Commerce Commission of the United States, alleging that the rates and charges on the above-mentioned shipments were unjust and unreasonable as to the plaintiff, and that thereafter the defendants filed their answer with and before the Interstate Commerce Commission. That said matter was docketed before the Interstate Commerce Commission under Docket No. 16,742.

6.

That the Interstate Commerce Commission issued and filed its findings of fact in said matter [121] on the 12th day of March, 1928.

That said Commission found that the said rates of 86½ cents and 84 cents per hundred pounds as above mentioned on said shipments from said points of origin in California to said points of destination in Arizona, were unreasonable as to the plaintiff to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on or after July 1, 1922, up to and including the 5th day of February, 1925, from Crockett, California and San Francisco, California.

And 71 cents per hundred pounds from Oxnard, California, and Betteravia, California, on and after July 1, 1922, up to and including the 5th day of February, 1925.

And that said report and findings found that the plaintiff was entitled to reparations on all of said shipments and to interest thereon.

That the plaintiff did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations.

7.

And on the 11th day of March, 1929, the [122] Interstate Commerce Commission duly made and published its order directing and requiring the defendants herein to pay to the plaintiff the following sums, to wit:

Southern Pacific Railroad $2104.58
Southern Pacific Railroad & Santa Maria Valley Railroad Company 359.75

together with interest thereon at the rate of 6% per annum from the respective dates of payment of the charges by the defendants; said sums to be paid on or before the 26th day of April, 1929; said sums being reparation on account of the unreasonable rates charged for the transportation of said carload shipments of sugar.

8.

That the defendants failed and refused to comply with said order and to pay said reparation or any part thereof, though request and demand was properly made by the plaintiff for the payment of same.

9.

That by reason of said unreasonable rates and charges and payments thereof by the plaintiff and by reason of the refusal of the [123] defendants to pay said reparation so awarded by the Interstate Commerce Commission, plaintiff is damaged in the total sum of $3,464.33, together with interest thereon at the rate of 6% per annum from the respective dates of payment.

10.

That the plaintiff was required to employ attorneys at law to prosecute the present action in order to effect collection of said reparation and that 20% of the total amount due including interest and principal is reasonable as attorneys' fees. [124]

CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Court finds as conclusions of law as follows:

1.

That the order of the Interstate Commerce Commission, dated March 11, 1929, and made and entered in that certain proceeding before said Commission entitled Traffic Bureau of Phoenix Chamber of Commerce et al. vs. Atchison, Topeka and Santa Fe Railroad Company et al., Docket No. 16,742, which order required said defendants to pay to the plaintiff herein certain sums of money, as set forth in said order and in plaintiff's complaint, was and is a legal, valid and binding order and was made and entered by said Interstate Commerce

Commission in said cause and was within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making [125] of said order the said Interstate Commerce Commission acted within its jurisdiction and power.

2.

That the rates of 86½ and 84 cents per hundred pounds charged the plaintiff by the defendants between the 21st day of February, 1923, and the 5th day of February, 1925, on shipments of thirty-two carloads of sugar originating at San Francisco, California, Crockett, California, Oxnard, California and Betteravia, California, as shown on Exhibit "A," attached to plaintiff's complaint were as found by the Interstate Commerce Commission in said proceeding known as docket No. 16,742, unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on all said shipments from Crockett, California, and San Francisco, California, to Phoenix, Arizona, after the date of July 1, 1922, and up to and including the 5th day of February, 1925; and 71 cents per hundred pounds on all of said shipments from Oxnard, California, and Betteravia, California, to Phoenix, Arizona, after the [126] first day of July, 1922, and up to and including the 5th day of February, 1925.

And that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines during said dates was 73 cents per hundred pounds on all said shipments from Crockett, California, and San Francisco, Cali-

fornia, to Phoenix, Arizona, and 71 cents per hundred pounds on all shipments between said dates from Oxnard, California, and Betteravia, California.

3.

That by reason of said overcharge, the plaintiff has been damaged and the defendants and each of them, became and are jointly and severally indebted to the plaintiff in the sum of $2,464.33, together with interest at the rate of 6% per annum from the respective dates of payment of the charges as shown on Exhibit "A," attached to plaintiff's complaint, amounting to the sum of $933.91, and attorneys' fees of 20% of the total amount of said indebtedness, including principal and interest, amounting to the sum of $675.60, together with the other costs incurred by plaintiff in this [127] action and the plaintiff is entitled to judgment therefor.

Done and dated this —— day of ——, 1930.

_____,
Judge.

The receipt of a copy of the within instrument acknowledged this 27 day of June, 1930.

BAKER & WHITNEY and
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Plaintiff.

Filed Jun. 27, 1930. [128]

[Title of Court and Cause—Nos. L.-695, L.-696—Phoenix.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY DEFENDANTS.

The defendants, considering the facts hereinafter set forth to have been proved, and deeming them essential, request the Court to make findings of fact and conclusions of law as follows:

A. FINDINGS OF FACT.

1. These causes were, by written agreement of the parties, duly filed, consolidated for purposes of trial and decision, and were jointly tried upon a consolidated record by the Court on the 8th day of January, 1930, a trial by jury having been duly waived by written stipulation of the parties.

2. Plaintiff and defendants, by and through their respective attorneys and counsel, filed with the Court a written agreed statement of facts; and plaintiff offered certain documentary testimony in support of its complaints; and, pursuant to stipulation, the parties subsequently, on the 23d day of June, [129] 1930, offered certain oral testimony with respect to the matter of the fees to be allowed to plaintiff's attorneys and counsel; and the Court was duly requested in writing to make, enter, and file special findings of fact in said causes, prior to rendering judgment.

3. Plaintiff now is, and at all times herein mentioned was, a corporation organized and existing

under the laws of the State of Arizona, and qualified to do business in said State.

4. Defendants Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company, and Santa Maria Valley Railroad Company now are, and at all times herein mentioned have been corporations duly organized and existing as such, and engaged in the operation of lines of railroads, pursuant to the authority of law, as common carriers for hire, and in the transportation of property by means of their lines of railroad and in conjunction with their connecting carriers, in interstate commerce from points in the State of California to points in the State of Arizona.

Defendant Bay Transport Company now is, and at all times herein mentioned was, a corporation duly organized and existing as such, and engaged in the transportation of freight by water, in interstate commerce, as a connection of the railroad corporation hereinbefore referred to.

5. Heretofore, and at various dates between the 6th day of February, 1923, and the 10th day of February, 1925, said plaintiff shipped or caused to be shipped from San Francisco, Crockett, Oxnard, Betteravia, and Spreckels, California, to Phoenix, Arizona, over the lines of said defendants, eighty-two carload shipments of sugar; that said shipments are severally set forth upon the following list, which correctly shows in detail the dates upon which said shipment were made, the dates upon which the charges for the transportation thereof were [130] collected, the car initials and numbers of the cars in which the same were loaded and trans-

ported, the several points of origin thereof, the several weights of said shipments, the rates thereon assessed, and the charges thereon collected, the rates subsequently found by the Interstate Commerce Commission to have been reasonable, and the amounts which would have accrued under said last-mentioned rates (said last-mentioned rates and amounts being shown under the columns headed "as should be"), and the amount of reparation claimed by the plaintiff and allowed by said Commission with respect to each of said shipments: [131]

PLAINTIFF'S EXHIBIT "C."

The following is a list of shipments involved in Cause No. L.-695.

CLAIM No. 806-2.

Claim No. 806-2 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Suger, Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via A. T. & S. F. Ry. Co.						
1923	1923									
2-24	2-26	AT	26966	San. FR.	60450	86½	522.89	73	441.29	81.60
7-25	7-31	AT	36212	"	61152	86½	528.96	73	446.41	82.55
8-30	9- 6	AT	116775	"	60758	86½	525.56	73	443.53	82.03
10- 4	10- 9	AT	34714	"	60819	86½	526.08	73	443.98	82.10
11-16	11-21	DLW	43738	"	61093	86½	528.45	73	445.98	82.47
11-23	11-30	AT	63696	"	68450	86½	592.09	73	499.69	92.40
12- 1	12- 7	AT	116509	"	61115	86½	528.64	73	446.14	82.50

Date Shipped	Date Collected	Initials	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	Should be Rate	Should be Amt.	Reparation
1924.	1924.									
1- 2	1- 7	AT	116055	San FR.	60725	86½	525.27	73	443.29	81.98
1-11	1-17	AT	118045	"	61316	84	515.05	73	447.61	67.44
1-16	1-21	AT	39566	"	83955	84	705.22	73	612.87	92.35
1-18	1-24	AT	46224	"	60619	84	509.20	73	442.52	66.68
1-25	1-30	AT	27562	"	60715	84	510.01	73	443.22	66.79
2- 4	2- 8	AT	32233	"	60770	84	510.47	73	443.62	66.85
2-20	2-26	AT	116304	"	60832	84	510.99	73	444.07	66.92
3-20	3-24	AT	118181	"	61224	84	514.28	73	448.94	67.34
5-17	5-22	AT	116599	"	61009	84	512.48	73	445.37	67.11
6- 3	6- 9	AT	117726	"	61195	84	514.08	73	446.72	67.36
7- 7	7-14	AT	116356	"	60732	84	510.15	73	443.34	66.81
7-29	8- 4	AT	46535	"	61065	84	512.95	73	445.77	67.18
8-23	8-28	AT	38975	"	60959	84	512.06	73	445.00	87.06
9- 4	9- 9	AT	35968	"	60770	84	510.47	73	443.62	66.85
9-24	9-29	AT	117847	"	60915	84	511.69	73	444.68	67.01
1923.	1923.									
2- 6	2-13	AT	33480	"	60625	86½	524.41	73	442.56	81.85

[132]

Date Shipt.	Date of Collection	Car Int.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via A. T. & S. F. Ry. Co.						
1924.	1924.									
9-27	10-3	AT	116476	San. Fran.	60713	84	509.99	73	443.20	66.79
11-21	11-28	AT	65098	"	60871	84	511.32	73	444.36	66.96
12-27	12-31	AT	63603	"	60812	84	510.82	73	443.93	66.89
	1925.									
12-29	1- 3	AT	130017	"	80905	84	679.60	73	590.61	88.99
1925.	1925.									
1-22	1-25	AT	36086	"	61222	84	514.26	73	446.92	67.34
1-30	2- 4	AT	65112	"	60512	84	508.30	73	441.74	66.56
2- 3	2- 6	AT	43806	"	60700	84	509.88	73	443.11	66.77
2- 5	2-10	AT	47163	"	60737	84	510.19	73	443.38	66.81

Shipped	Collection	Int.	No.	(Calif.)	Weight	Rate	Amt.	Rate	Amt.	Depreciation
1923.	1923.		Routed via B. T. Co., San Francisco AT. SF. Ry. Co.							
2-16	2-23	NYC	246308	Crockett	60456	86½	522.90	73	441.33	81.57
2-28	3- 6	AT	26875	"	60450	86½	522.90	73	441.29	81.61
5- 9	5-15	AT	27369	"	60450	86½	522.90	73	441.29	81.61
6- 1	6- 7	AT	32244	"	61138	86½	528.84	73	446.31	82.53
6-14	6-19	AT	34050	"	60751	86½	525.50	73	443.48	88.02
7-31	8- 7	AT	27200	"	60717	86½	525.21	73	443.23	81.98
8- 9	8-15	AT	49701	"	60717	86½	525.21	73	443.23	81.98
8-22	8-29	AT	48544	"	83093	86½	718.75	73	606.58	112.17
9-28	10- 4	AT	38360	"	60690	86½	524.79	73	443.04	81.93
12-14	12-19	NOTM	2480	"	60781	86½	525.75	73	443.70	82.05
1924.	1924.									
2-20	2-26	AT	33637	"	60882	84	511.41	73	444.44	66.97
3- 3	3- 7	AT	33848	"	60986	84	512.29	73	445.20	67.09
5- 1	5- 6	AT	35949	"	60966	84	512.12	73	445.05	67.07
6-28	7- 2	AT	63056	"	60690	84	509.80	73	443.04	66.76
8-14	8-19	AT	31198	"	60809	84	510.80	73	443.91	66.89

Date Shipt.	Date of Collection	Car Int.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via S. P. Bay Point A. T. & S. F. Ry. Co.						
1923.	1923.									
4–30	5– 7	SP	35299	Crockett	60737	86½	525.38	73	443.38	82.00
	1924.									
12–29	1– 4	DLW	38646	"	60723	86½	525.25	73	443.28	81.97
1924.	1924.									
2– 3	2–11	SSW	25848	"	60692	84	509.81	73	443.05	66.76
				Routed via S. P. Los Angeles, A. T. & S. F. Ry.						
2–20	2–28	CM&StP.	92364	Spreckles	60450	84	507.78	73	441.29	66.49
				Totals			26483.38		22731.59	3751.79

With Accrued Interest.

THE ARIZONA GROCERY COMPANY, Claimants.

By ROLAND JOHNSTON, Attorney,

Room 14, Arizona Fire Building—Phoenix, Arizona, April 16, 1928.

Pltf.'s Exhibit *No.* "C." Admitted and Filed January 8, 1930. C. R. McFall, Clerk. By J. Leo Baker, Chief Deputy Clerk. Case No. L.—Phx. & L.-696—Phx. Arizona Gro. Co. vs. So. Pac. Co. et al. [124]

PLAINTIFF'S EXHIBIT "B."

The following is a list of shipments involved in Cause No. L.-696:

EXHIBIT "B."

CLAIM No. 805-1.

Claim No. 805-1 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Sugar, Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1923.	1923.									
2-22	3- 1	CM&StP	87286	Crockett	60789	86½	525.82	73	443.76	82.06
3-13	3- 2	GH&SA	50987	San. Fran.	60896	86½	526.75	73	444.54	82.21
3-20	3-28	SP	87745	"	60813	86½	526.03	73	443.93	82.10
4-25	5- 2	SP	35005	"	60788	86½	525.82	73	443.75	82.07
5-12	5-19	SP	27309	"	60838	86½	526.25	73	444.12	82.13
6-27	7-10	SP	16940	"	81023	86½	700.85	73	591.47	109.38
9-14	9-20	SP	26505	Oxnard	60450	86½	522.89	71	429.20	93.69
9-19	9-26	SP	35048	San Fran.	60838	86½	526.25	73	444.12	82.13
10-11	10-18	SP	21533	Oxnard	60450	86½	522.89	71	429.20	93.69

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	As Charged Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1924.	1924.									
2–5	2–12	CGW	29288	Oxnard	60450	84	507.78	71	429.20	78.58
3–22	3–28	SP	16776	San Fran.	60750	84	510.30	73	443.48	66.82
2–29	4– 9	SP	29047	"	60782	84	510.67	73	443.71	66.88
4–11	4–17	NYC	248647	"	60940	84	511.90	73	444.86	67.04
6–14	6–20	NYC	51840	Crockett	60651	84	509.47	73	442.75	66.72
6–24	7– 2	SP	28501	San Fran.	60964	84	512.10	73	445.04	67.06
6–25	7– 2	SP	81424	Crockett	60678	84	509.70	73	442.95	66.75
8–16	8–25	Sou.	135043	"	60657	84	509.52	73	442.80	66.72
8–28	9– 2	SP	16630	"	60733	84	510.16	73	443.35	66.81
9–18	9–24	SP	81461	"	60690	84	509.80	73	443.04	66.76
9–25	10– 1	LW	32523	"	60677	84	509.69	73	442.94	66.75
11– 5	11–14	MK&T	68173	San Fran.	61253	84	514.53	73	447.15	67.38
11–13	11–18	SP	30000	Crockett	60679	84	509.70	73	442.98	66.74
12–1	12– 8	SP	28487	"	60640	84	509.38	73	442.67	66.71

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Railway.						
1924.	1924.									
12- 3	12- 9	SP	30791	San Fran.	60669	84	509.62	73	442.88	66.74
12-15	12-22	SP	21267	Crockett	90707	84	761.94	73	662.16	99.78
1925.	1925.									
1- 7	1-13	SP	29825	San Fran.	60983	84	512.25	73	445.18	67.07
1-14	1-19	SP	27862	"	60890	84	511.48	73	444.50	66.98
1-29	2- 4	SSW	27113	Crockett	60676	84	509.68	73	442.93	66.75
1923.	1923.			Routed via S. M. V. R. R. Co.—S. P. Co.						
9-16	9-20	SP	16564	Betteravia	60450	86½	522.89	71	429.50	93.69
9-28	10- 5	LW	32484	"	60450	86½	522.89	71	429.20	93.69
10- 9	10-16	SP	87173	"	60450	86½	522.99	71	429.20	93.79

vs. Arizona Grocery Co.

149

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1924 6–16	1924. 6–23	GH	50670	Betteravia	60450	84	507.78	71	429.20	78.58
				Totals			16,929.67		14,465.44	2464.23

With Accrued Interest.

ARIZONA GROCERY COMPANY, Claimant.
By ROLAND JOHNSTON, Attorney,
Room 14—Arizona Fire Building,
Phoenix, Arizona, April 16, 1928.

Pltf.'s Exhibit *No.* "B." Admitted and Filed January 8, 1930. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Case No. L.-695—Phx. & L.-696—Phx. Arizona Gro. Co. vs. So. Pac. Co. et al. [136]

6. On the 22d day of June, 1921, in a proceeding before the Interstate Commerce Commission known as Docket 11,532, entitled "Traffic Bureau, Phoenix Chamber of Commerce et al., Complainants, vs. Director General et al., Defendants" (to which proceeding Arizona Grocery Company, a copartnership, predecessor in interest of the plaintiff herein, was a party complainant) upon a complaint alleging that the rates on sugar in carloads from points in California (including all points in said State referred to in said list of shipments hereinbefore set forth) to Phoenix had been, were, and in the future would be unreasonable in violation of the Interstate Commerce Act, said Commission after due hearing and investigation duly made and rendered its opinion and order in said proceeding dated June 22d, 1921, which said opinion is reported in Volume 62, I. C. C. reports, at pages 412 and following. Said report and order ~~were and are as follows:~~ fixing a maximum rate of 96½ cts. per 100 lbs.** [137]

**[See p. 426 for Stipulation as to correct matter.]

No. 11532.

TRAFFIC BUREAU, CHAMBER OF COMMERCE, PHOENIX, ARIZ., et al.

v.

DIRECTOR GENERAL, AS AGENT, SOUTHERN PACIFIC COMPANY, et al.

Submitted April 12, 1921. Decided June 22, 1921.

1. Rates on sugar, in carloads, from California points to Phoenix, Arix., found unreasonable. Reasonable rate prescribed for the future.
2. Following *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C., 368, prayer for the establishment of through routes and joint rates from San Francisco, Calif., by way of Phoenix, to points on the Southern Pacific, Maricopa, Ariz., to El Paso, Tex., denied.

Roland Johnston for complainants.

F. A. Jones for Arizona Corporation Commission, intervener.

E. W. Camp, Elmer Westlake, G. H. Baker, and *M. A. Cummings* for defendants.

REPORT OF THE COMMISSION.

Division 1, Commissioners McCHORD, AITCHISON, and LEWIS.

AITCHISON, *Commissioner:* This case was made the subject of a proposed report by the examiner. Exceptions thereto were filed by defendants.

Complainants are the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, Hall-Pollock Company, and Haas-Baruch & Company, corporations, an dthe Arizona Grocery Company, a partnership.

The three firms named are engaged in the grocery business at Phoenix. By complaint filed June 14, 1920, they allege that the rates charged by defendants for the transportation of sugar from points in California to Phoenix, were and are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, 3, and 4, of the interstate commerce act and section 10 of the federal control act. They ask us to prescribe just and reasonable rates for the future, to award reparation on all shipments moving subsequently to May 2, 1916, and to establish through routes and joint rates from San Francisco, Calif., by way of Phoenix, to Maricopa, Ariz., and points east thereof, on lines of the Southern Pacific Company, to and including El Paso, Tex. The Arizona Cor- (413) poration

412

62 I. C. C. [138]

Commission intervened on behalf of complainants. The allegation of a fourth section violation was abandoned at the hearing. Rates are stated herein in amounts per 100 pounds.

Phoenix is the only point in Arizona common to the lines of the Atchison, Topeka & Santa Fe Railway and the Southern Pacific. It is located on the branch of the Santa Fe extending south from Ash Fork, Ariz., but is served by that carrier on traffic from California by means of a branch line known

as the Parker cut-off, which leaves the main line at Cadiz, Calif., and connects with the Ash Fork branch at Wickenburg, Ariz., Phoenix is served by the Southern Pacific through the medium of the Arizona Eastern Railroad, which it owns and with which it connects at Maricopa, a point on the main line 35 miles southerly from Phoenix. The short-line mileage from San Francisco to Phoenix is via the Santa Fe over the Parker cut-off; from Los Angeles, via the Southern Pacific lines.

Sugar is produced at various points in California. Hawaiian cane sugar is refined at San Francisco and at Crockett, a point 29 miles east of San Francisco on the Southern Pacific; beet sugar is produced at Alvarado, Betteravia, Spreckels, Los Alamitos, Dyer, Delhi, Oxnard, and other points in the central and southern portions of the state. For the purpose of stating rates to Arizona, the refining and producing points of origin in California are included in one group. Rates on sugar from California are also grouped as to destination points. On the main line of the Santa Fe a destination group extends from Yucca, Ariz., to El Paso, and on the main line of the Southern Pacific from Yuma, Ariz., to El Paso. Los Angeles is the nearest point in the California group to Phoenix, and San Francisco possibly the farthest. The distance to Phoenix via the Santa Fe are 489 and 800 miles, and via the Southern Pacific, 451 and 920 miles respectively, from the two points of origin.

On May 1, 1916, the rates on sugar from the California group to Phoenix were 60 cents, minimum

weight 60,000 pounds, and 65 cents, minimum weight 36,000 pounds. Contemporaneously rates from the California group to points in the destination groups described were 5 cents lower than the corresponding Phoenix rates. This difference of 5 cents in favor of main-line points was fixed by us in *Arizona Corporation Commission* v. *A., T. & S. F. Ry. Co.*, 34 I. C. C., 158, in which we found the Phoenix rate of 75 cents, minimum 36,000 pounds, unreasonable to the extent that it exceeded, by more than 5 cents, the main-line rate to Maricopa. On June 25, 1918, these rates were increased 25 per cent, the main-line rates becoming 69 and 75 cents and the Phoenix rates 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increases, and the rates to main-line points became 77 and 82 cents on November

62 I. C. C. [139]

(414) 25, 1919, and to Phoenix, 82 and 87 cents on February 18, 1920. On February 29, 1920, defendants canceled the rates to main-line and branch-line points, including Phoenix, under the lower minimum weight published in connection with roads under federal control and, as to such roads, increased the Phoenix rate under the minimum weight of 60,000 pounds to 83.5 cents which, apparently, was done by advancing the 5-cent difference over main-line points to 65.5 cents. In schedules filed to become effective May 14, 1920, the carriers attempted to bring the rates of nonfederal lines into harmony with those of the lines previously under federal control, but upon protest we suspended the

items carrying such increases. In *Sugar from California Points to Arizona,* 58 I. C. C. 737, we held that the cancellation of the 36,000-pound minimum was justified and vacated the order of suspension. The present rates, including the general increases authorized by us on July 29, 1920, are 96.5 cents to main-line points and $1.045 to Phoenix, minimum weight 60,000 pounds. The Phoenix rate applies to practically all points on the Arizona Eastern north of Maricopa and to all points on the branch line of the Santa Fe south of Ash Fork and as far west as Parker, Ariz., There is no movement of sugar from California through Phoenix to points beyond taking lower rates.

Complainants admit that the grouping of California sugar-producing points is advantageous, as it gives them the benefit of a wide purchasing market on a uniform rate. They contend, however, that the rates to Phoenix are unreasonable, in comparison with lower rates from the California group to points involving hauls for distances which are greatly in excess of those to Phoenix. In the subjoined statement the revenues per car, per ton-mile, and per car-mile yielded by the rates to Phoenix are compared with revenues produced by certain of the rates cited by complainants. The rates shown include the general increases authorized by us on July 29, 1920.

From—	To—	Distance.	Rate per 100 pounds.	Revenue. Per car.	Revenue. Per ton-mile.	Revenue. Per car-mile.
		Miles			*Mills.*	*Cents.*
Los Angeles, Calif.	Phoenix, Ariz.	451	[1]$1.045	$627.00	46.3	139
San Francisco, Calif.	Do.	800	[1] 1.045	627.00	26.1	78.3
Betteravia, Calif.	Do.	655	[1] 1.045	627.00	31.9	95.7
Do.	El Paso, Tex.	1,020	[1] .965	579.00	18.9	56.7
New Orleans, La.	Do.	1,192	[2] 1.080	388.80	18.1	32.6
San Francisco, Calif.	St. Paul, Minn.	2,154	[1] 1.025	615.00	10	28.6
Los Angeles, Calif.	Chicago, Ill.	2,231	1.09525	657.00	9.8	29.4

[1] Minimum weight 60,000 pounds.

[2] Minimum weight 36,000 pounds.

Defendants take the position that the rates on sugar from California producing points to the central and eastern sections of the (415) country

62 I. C. C. [140]

are on a subnormal basis due to the necessity of marketing the California product, which greatly exceeds local consumption, in competition with sugar refined at New Orleans and Atlantic Seaboard points; that a normal basis of rates would prevent the movement of California sugar because of the great disparity in distances from the competing refineries to the common markets; and that intermediate main-line points are given the benefit of these extremely low competitive rates. They attempt to justify the present rates to Phoenix on the grounds that the volume of movement is small and that market conditions present at El Paso and the other points cited by complainant are not met with at Phoenix. They argue that we recognized the potency of market competition in *Fourth Section Violations in Rates on Sugar,* 31 I. C. C., 511, by permitting the maintenance of lower rates on sugar from California to Missouri River points than those contemporaneously in effect to intermediate points on the Rock Island east of Tucumcari, N. Mex., in connection with routing, Southern Pacific to El Paso, El Paso & Southwestern to Tucumcari, Rock Island beyond. In that case we required the Southern Pacific to hold the El Paso rate from California as maximum at intermediate points, and denied the Santa Fe authority to charge lower rates from California to Trinidad, Colo., and points east thereof

than it contemporaneously maintained to intermediate points. Accordingly, these carriers reduced the main-line rates in Arizona and New Mexico to the level of the rates to El Paso and Trinidad, respectively.

A partial list of the shipments on which reparation is sought shows that 48 carloads moved during the period June, 1919, to August, 1920, inclusive, 34 being routed via Southern Pacific and 14 via Santa Fe. A statement filed by the defendants shows that during the years 1916, 1917, 1919, and the first six months of 1920, 348 cars aggregating 9,423 tons moved from California points to Arizona via Santa Fe, of which 78 cars aggregating 2,229 tons moved to Phoenix.

From Betteravia, which may be taken as fairly representative of the California group, the present rate to Phoenix yields, for a distance of 655 miles, revenues of $627 per car, 95.7 cents per car-mile, and 31.9 mills per ton-mile upon the basis of the tariff minimum weight of 60,000 pounds. A substantial volume of sugar moves from California to Phoenix in carloads. While, no doubt, relatively lower rates are justified to more distant points where the force of market competition is controlling, nevertheless, Phoenix is entitled to rates, which, measured by present-day standards, are just and reasonable. If, however, the rates to competitive points are remunerative, then clearly the rates to Phoenix are excessive, even after giving due con-

(416) sideration to the volume of traffic handled to the points in question, and the character of the haul into Arizona. The rate of 96.5 cents from California is carried on the main line of the Southern Pacific for a distance of 400 miles east of Maricopa. The application of the same rate to Phoenix, but 35 miles distant from Maricopa does not appear to be unreasonable. The Southern Pacific and the Arizona Eastern are properly treated as one line in this instance. *Pacific Creamery Co.* v. *S. P. Co.*, 42 I. C. C., 93, 96.

Complainants contend that the maintenance of rates from California of $1.045 to Phoenix and 96.5 cents to Tucson is unduly prejudicial to Phoenix, to the undue preference and advantage of Tucson. The record shows that Phoenix jobbers sell sugar at several points in territory contiguous to both Phoenix and Tucson, in competition with jobbers located at the latter point. While there is an indication that in some instances the Phoenix jobbers must shrink their profits to compete with Tucson, there is no evidence to show that this results from the difference in rates from California to the two competing points.

Complainants' request for the establishment of through routes and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the lines of the Southern Pacific to and including El Paso is substantially the same as was made in *Phoenix Chamber of Commerce* v. *Director General*, 62 I. C. C., 368, and the evidence is identical by reason of the stipulation into this record of

the testimony there introduced. In that case we found that the proposed arrangement had not been shown to be necessary or in the public interest and denied the petition. There is no basis for a different finding on this record.

We find that the rates attacked were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents. There is no evidence of record that complainants made shipments of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher than those herein found reasonable. In the event that such shipments were made, complainants should file statements under rule V of the Rules of Practice, showing the details of such shipments, accompanied by appropriate proof in the form of an affidavit that the shipments were made and that the freight charges were paid and borne by complainants. If defendants object to proof in the form of an affidavit they may request a further hearing with respect to the subject matter thereof.

The prayer for a through route and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the line of the Southern Pacific, to and including El Paso, is denied.

An appropriate order will be entered.

62 I. C. C. [142]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22d day of June, A. D. 1921.

No. 11532.

Traffic Bureau of the Chamber of Commerce, Phoenix, Ariz.; Hall-Pollock Company, Phoenix, Ariz.; Haas-Baruch & Company, Incorporated, Phoenix, Ariz.; The Melczer Company, Phoenix, Ariz.; and the Arizona Grocery Company, Phoenix. Ariz.,

v.

James C. Davis, Director General of Railroads, as Agent; Southern Pacific Company; Arizona Eastern Railroad Company; and The Atchison, Topeka and Santa Fe Railroad Company.

This case being at issue upon the complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, on or before September 17, 1921,

and thereafter to abstain, from publishing, demanding, or collecting their present rates for the transportation of sugar in carloads from California points to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 17, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar in carloads from California points to Phoenix, Ariz., rates which shall not exceed 96.5 cents per 100 pounds.

It is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 1.

[Seal] GEORGE B. McGINTY,
Secretary. [143]

Thereafter the defendants in said proceeding before said Commission including the defendants in these causes and their connecting carriers, duly and regularly filed and published their tariffs effective September 17, 1921, ~~complying with the Commission's order in said Docket No. 11532,~~** and naming a rate of 96 cents per hundred pounds on sugar, in carloads, from points in California to Phoenix, Arizona, which said rate was one-half cent less than

**[See p. 426 for Stipulation as to correct matter.]

the rate of 96½ cents per hundred pounds found as a maximum rate ~~not unreasonable~~** for the future by said Commission in said Docket No. 11532.

Said rate of 96 cents per 100 pounds remained in effect until on or about July 1, 1922, upon which date, in accordance with the recommendations made by said Commission in a report in a proceeding known as Docket No. 13,293, Reduced Rates 1922, reported in Volume 68, I. C. C. Reports, at pages 676 and following, said rate of 96 cents was voluntarily reduced to 86½ cents per hundred pounds said last-mentioned rate of 86½ cents per hundred pounds was named in tariffs of said defendants herein, and of other carriers engaged in interstate commerce, and was duly and regularly filed with the Interstate Commerce Commission in accordance with law.

Said last-mentioned rate of 86½ cents per hundred pounds remained in effect until on or about January 10, 1924, upon which date the same was voluntarily reduced to 84 cents per hundred pounds; said last-mentioned rate of 84 cents was duly and regularly established by these defendants ~~and by other common carriers engaged in interstate commerce,~~** and was named in tariffs duly and regularly filed in accordance with law.

Said rates of 86½ cents per hundred pounds and 84 cents per hundred pounds were the rates which

**[See p. 426 for Stipulation as to correct matter.]

were successively in effect, and assessed upon complainant's shipments during the [144] period of movement thereof. Said rates are the rates referred to "as charged" upon said list of shipments hereinbefore set forth.

7. Said last-mentioned rate of 84 cents per hundred pounds remained in effect until February 25, 1925, upon which date the same was reduced to 71 cents per 100 pounds, pursuant to and in compliance with certain findings and orders made by said Commission in a proceedings known as Docket No. 14,449, reported in Volume 95, I. C. C. Reports, at pages 244, and following, in which preceeding the Traffic Bureau of the Phoenix Chamber of Commerce, and certain others ~~including the plaintiff~~** were complainants, and in which proceedings said complainants alleged that the rates on sugar from points in California, including the points of origin of the shipments of plaintiff herein, to Phoenix, Arizona, had been, were, and in the future would be, unreasonable. ~~Said report and order of said Commission in said proceeding, Docket No. 14449, were and are as follows:~~ ** [145]

**[See p. 426 for Stipulation as to correct matter.]

10081

INTERSTATE COMMERCE COMMISSION

No. 14449

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL., *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

26875—25

Washington: Government Printing Office: 1925

[146]

No. 14449

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted July 14, 1923. Decided January 6, 1925

Rate on sugar, in carloads, from California points to Phoenix, Ariz., found to have been and to be unreasonable, but not unjustly discriminatory, or unduly prejudicial. Reasonable rate for future prescribed, and reparation awarded.

Roland Johnson for complainants.

E. W. Camp, Chalmers, Stahl, Fennemore & Longan, James R. Bell, F. H. Wood, F. B. Austin, G. B. Durbrow, Elmer Westlake, James E. Lyons and *G. P. Bullard* for defendants.

Roland Johnston, D. R. Johnson, and *L. G. Reif* for Arizona Corporation Commission.

REPORT OF THE COMMISSION.

By the COMMISSION:

Exceptions were filed by complainants to the report proposed by the examiner. We have reached conclusions differing from those proposed by him.

Complainants are the Traffic Bureau of the Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, and Haas-Baruch & Company, Hall-Pollock Company, the Melczer Company, and James A. Dick Company, Corporations, engaged in the wholesale grocery business at Phoenix. By complaint filed November 3, 1922, they allege that the rates on sugar, minimum 80,000 pounds, from San Francisco and other points in California to Phoenix are, and since February 17, 1921, have been unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of the long-and-short-haul provision of the fourth section. The prayer is for reasonable and nonprejudicial rates for the future, and reparation on past shipments. The Arizona Corporation Commission intervened on behalf of complainants and the El Paso Chamber of Commerce also intervened. The rates will be stated in amounts per 100 pounds.

(245) Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ashfork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashfork-Phoenix branch, approximately 54 miles north of Phoenix. The traffic from California moving over the Southern Pacific reaches Phoenix through the medium of the Arizona Eastern Railway, which connects with the Southern Pacific at Maricopa, 35 miles southerly from Phoenix. The points of production extend from San Francisco on the north to Los Angeles on the south and include a number of points where Hawaii and California beet sugar is refined. For the purpose of stating rates on sugar to Arizona, the refining points are included in one group and Arizona points are also grouped. The destination group includes all points on the main line of the Santa Fe from Yucca, Ariz., to El Paso, Tex. It also includes points on the main line of the Southern Pacific from Yuma, Ariz., to El Paso, but the fifth-class rates are observed as maxima, which produces rates at Yuma and a few contiguous points slightly lower than the commodity rate. The distances to Phoenix over the Santa Fe are 489 and 800 miles, and over the Southern Pacific 451 and 921 miles, from Los Angeles and San Francisco, respectively, the nearest and most distant refining points. Using the shorter of the two routes in

each instance, the average distance from Los Angeles and San Francisco to Phœnix is about 625 miles. The complainants presented exhibits purporting to show that the average short-haul distance from the points of origin involved to Phoenix is approximately 581 miles.

From September 17, 1921, to and including June 30, 1922, a rate of 96 cents, minimum 60,000 pounds, applied on sugar from the California points to Phoenix. On the latter date it was reduced under the general reductions of 1922 to 86.5 cents. The 86.5-cent rate also applied to practically all mainline points on the Southern Pacific from the California State line to El Paso, Tex., inclusive, including Tucson, Ariz., said to be a point competitive with Phoenix. Following the general reductions of 1922, the defendants until recently maintained rates on sugar ranging from 79 cents at St. Louis, Mo., and Chicago, Ill., and a number of points grouped therewith, to 83 cents at Burlington, Iowa, and points grouped therewith, minimum 80,000 pounds. To the same territory somewhat higher rates subject to a minimum of 60,000 pounds were maintained, the (246) rate to Chicago be-

95 I. C. C. [148]

ing 91 cents. Complainants contend that the rate to Phoenix should not exceed the rates to the more distant points, and, in fact, should be lower than the rates to El Paso and Tucson, reflecting the shorter hauls to Phoenix than to El Paso and Tucson. The rates to the latter points apply in con-

nection with a 60,000 pounds minimum, the same as to Phoenix.

At the hearing, the complainants offered testimony intended to show unjust discrimination and undue prejudice against Phoenix and preference for Tucson, which consisted principally of a comparison of the carload rates to and the less-than-carload rates beyond Phoenix, with the rates to and beyond Tucson. It was claimed that Tucson merchants have some advantage over merchants at Phoenix under the in-and-out rates. The outbound rates from Phoenix to Southern Pacific points are on a two-line basis, while the rates from Tucson to the same points are on a lower one-line basis prescribed by the Arizona Corporation Commission, and the differences in the total in-and-out rates are represented by the differences in the outbound rates. Outbound shipments from Tucson to points on the Arizona Eastern apparently are often handled by motor trucks rather than by rail. No further discussion will be made of the Tucson situation inasmuch as the complaint appears to raise the issue of undue prejudice and discrimination only as to points east of Phoenix to which the rates were lower than to that point. No evidence of direct competition between Phoenix, on the one hand, and points alleged in the complaint to be preferred, on the other, appears of record.

Complainants' evidence in support of their allegation of unreasonableness consists principally of comparisons with rates on sugar from California to representative points in the Middle West such

as Burlington and Chicago, and from Sugarland, Tex., New Orleans, La., and Colorado points to El Paso and Phoenix. At the time of the hearing, many of these rates were in issue in *Sugar Cases of 1922*, 81 I. C. C. 448, decided July 14, 1923. In that decision fourth-section relief authorized by *Fourth Section Violations in Rates on Sugar*, 31 I. C. C. 511, permitting lower rates to Chicago and other Middle West points than to intermediate points, was withdrawn. The rates have subsequently been revised in conformity with the fourth section, the rate to Chicago becoming 84 cents, minimum 80,000 pounds, which rate is not exceeded at intermediate points. A rate of 84 cents has accordingly been established to Phoenix and points on the Southern Pacific in Arizona and New Mexico, and to El Paso, in connection with which rate a minimum of 60,000 pounds has been maintained.

95 I. C. C. [149]

(247) The following table shows a comparison of the present rate on sugar to Phoenix with rates offered by the complainants as indicating the unreasonableness of the rate under attack:

From—	To—	Distance	Rate	Minimum weight	Car-mile earning	Ton-mile earning
		Miles	*Cents*	*Pounds*	*Cents*	*Mills*
California	Phoenix	625	84	60,000	80.64	26.9
Sugarland	El Paso	804	71	36,000	31.79	17.66
New Orleans	do	1,193	86	36,000	25.95	14.42
Lamar, Colo	do	749	80.5	36,000	38.69	21.49
California	do	1,054	84	60,000	47.8	15.9
Do	Tucson	741	84	60,000	68.0	22.7

It is probable that the car-mile earnings shown, being based upon varying minimum weights, do not properly reflect the relative situation existing as to actual movements. The record does not, however, show the actual loading.

In *Memphis-Southwestern Investigation*, 77 I. C. C. 473, we prescribed for application in the general territory comprising Louisiana, Arkansas, and southern Missouri a distance scale of rates on sugar in which the rate for 625 miles is 58 cents. The present rate from California to Phoenix is approximately 43 per cent higher. In *Arizona Packing Co.* v. *A. E. R. R. Co.*, 81 I. C. C. 115, we prescribed on livestock, packing-house products, and fresh meats scales of rates to and from points in Arizona higher than scales also prescribed by us in Arkansas, Oklahoma, Louisiana, and Texas, known as the 1716 scales, but generally less than 30 per cent in excess of those rates. In that case we said, at page 120, with respect to rates from points in Arizona to points in California on beef cattle, sheep, and goats prescribed by us in *American National Live Stock Asso.* v. *S. P. Co.*, 26 I. C. C. 37:

> As originally prescribed, that scale was about 30 per cent higher than the 1716 scale, but this spread has been considerably narrowed in the course of general increases and reductions which have since been made. Rates based on the Arizona-California scale have been voluntarily established by the Santa Fe to points in Arizona from stations in New Mexico on its line west of Albuquerque.

The average revenue per ton-mile and per car-mile for the Atchison, Topeka & Santa Fe (entire line) for 1921 are shown as 16.42 mills and 29.96 cents, respectively, for an average haul of 331.69 miles. Similar figures for the Southern Pacific (Pacific system) are for revenue per ton-mile 17.31 mills, revenue per car-mile 34.93 cents, and average haul 288.51 miles. The figures for 1921 do not include the general reduction of 10 per cent made in 1922.

Defendants direct attention to the relatively small consuming markets in Arizona for sugar, and

show that the total movement [150] (248) to Phoenix is somewhat less than 100 carloads per annum. They further contend that there is no necessity, commercially or otherwise, for the establishment of lower rates on a minimum of 80,000 pounds than on a minimum of 60,000 pounds.

The rates on sugar from California points to Phoenix have been before the commission in a number of cases. In *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412, the commission found that the then existing rate of $1.045 to Phoenix was unreasonable to the extent that it exceeded 96.5 cents which contemporaneously applied to Tucson, Maricopa, Ariz., and other Southern Pacific main-line points. The circumstances under which the rates on sugar were established and the conditions surrounding its transportation to Phoenix are fully set out in that case and need not be further discussed here.

We find that the rates assailed have not been shown to be unjustly discriminatory or unduly preferential or prejudicial, but we find the rate from California points involved to Phoenix to have been and to be unreasonable to the extent that it exceeded and exceeds 79 and 71 cents per 100 pounds, respectively, prior and subsequent to July 1, 1922, minimum 60,000 pounds. We further find that complainants, Haas-Baruch & Company, Hall-Pollock Company, and the Melczer Company, made shipments and paid and bore charges thereon at the rate herein found unreasonable; that they have been damaged to the extent that the charges paid exceeded those that would have accrued at the rate herein found reasonable; and that they are entitled to reparation with interest. Complainants, Haas-Baruch & Company, Hall-Pollock Company, and the Melczer Company should comply with Rule V of the Rules of Practice.

An order for the future will be entered.

HALL, *Commissioner*, dissenting:

Some of these complainants came before us in June, 1920, attacking the rates on sugar, in carloads, from the California refineries to Phoenix and asking for reparation, just as they do here. The carload minimum then, as now, was 60,000 pounds. We found the rate unreasonable to the extent that it exceeded 96.5 cents, which we then prescribed for the future. That decision was made June 22, 1921. *Phoenix Chamber of Commerce* v. *Director General*, 62 I. C. C. 412. They now come by complaint filed November 3, 1922, and allege that a rate on the same traffic of 96 cents, 0.5 cent lower

than that so prescribed, has been unreasonable since February 17, 1921, four months prior to our former decision, and again ask reparation. Meantime, on July 26, 1922, we had found not unreasonable a rate of 96.5 cents, minimum 60,000 pounds, from California refining points to destinations in Nevada and Utah for hauls ranging from 419 to 823, miles,

95 I. C. C.

[151] (249) as compared with the hauls here considered ranging from 489 to 800 miles over the Santa Fe, and 451 to 921 miles over the Southern Pacific. *Nevada Public Service Commission* v. *S. P. Co.*, 73 I. C. C. 240. That rate also was reduced by the carriers to 96 cents. The general 10 per cent reduction of July 1, 1922, brought this reasonable rate down to 86.5 cents and later, in the general sugar readjustment, the carriers established to Phoenix a rate of 84 cents, minimum 60,000 pounds. All of these were lower than what we had found reasonable and prescribed.

The majority do not reverse those decisions. They do not show change in circumstances and conditions but refer to them as "fully set out" in *Phoenix Chamber of Commerce* v. *Director General*, *supra*. And yet they find unreasonable rates lower than the rate prescribed in that case, and award reparation to a level 17.5 cents lower than that found reasonable, for a period which begins four months before that case was decided.

The rate of 84 cents, minimum 80,000 pounds, established January 11, 1924, as a result of our findings in *Sugar Cases of 1922*, 81 I. C. C. 448, in which we declined to continue fourth-section relief

as to rates to Chicago, Ill., is blanketed from Chicago to and beyond Phoenix. The rate to Chicago under the 60,000-pound minimum is 91 cents. Comparison of the rates to the nearest and farthest points in a rate blanket of this extent is futile. The rate of 84 cents to Chicago is necessary if California sugar, concededly far exceeding the local demands, is to find a market in the Middle West in competition with sugar from refineries on the Atlantic seaboard and Gulf of Mexico. Other and broader blankets respond, like this, to the marketing demands of Pacific coast commodities. They should not be lightly disturbed.

For the average distance of 625 miles to Phoenix this 84-cent rate earns 26.8 mills per ton-mile, which compares favorably with 27.3 mills per ton-mile under the average present rate of 82 cents from California refineries to destinations in Nevada and Utah considered in the *Nevada case, supra,* for an average distance of 600 miles. There the annual movement was shown to be 79 carloads and here less than 100. The majority ignore these comparisons but rest on others less pertinent.

There is no evidence as to the volume of movement under the rates to El Paso from the refineries at Sugarland, Tex., New Orleans, La., and Lamar, Colo., or as to transportation conditions generally. A witness for defendants testified that the rates to El Paso reflect competition from these three refining points and that in this respect El Paso is comparable to Chicago, where the rates are depressed by competition from the Atlantic, the Pa-

cific, and the Gulf [152] (250) refineries. Nor
95 I. C. C.
is there any evidence that conditions surrounding movement of sugar in this territory are such as to warrant comparison with the Memphis-Southwestern scale. Lacking that evidence we look in vain to *Arizona Packing Co.* v. *A. E. R. R. Co.*, 81 I. C. C. 115, cited by the majority.

The reasonableness of the basis prescribed is not self-demonstrative. Nor is this failure of demonstration supplied by the evidence of record, by the comparison with the Memphis-Southwestern scale, injected by the majority, or by the necessities of the case. Under such circumstances the complaint should be dismissed. I am authorized by Chairman AITCHISON and Commissioners ESCH and LEWIS to say that they concur in this expression of dissent. [153]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of January, A. D. 1925.

No. 14449

Traffic of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; The Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 25, 1925, and thereafter to abstain, from publishing, demanding, or collecting their present rates for the

transportation of sugar, in carloads, from points in California to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 25, 1925, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., rates which shall not exceed 71 cents per 100 pounds, minimum 60,000 pounds.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary. [154]

In compliance with said Commission's order in said Docket No. 14449, the defendants therein, including the defendants in these causes, established, on or about February 25, 1925, a rate of 71 cents per 100 pounds on sugar, in carloads, from all points in California, to Phoenix, Arizona, which said rate was duly and regularly published in tariffs filed with said Commission, in accordance with law.

8. Thereafter and on February 8, 1927, said Interstate Commerce Commission reopened said proceeding, Docket No. 14,449, upon petition of the defendants therein, for oral argument jointly with

a subsequent proceeding brought by the Traffic Bureau of the Phoenix Chamber of Commerce and certain others (including plaintiff) as complainants, and known as Docket No. 16,742.

In said last-mentioned proceeding, Docket No. 16,742, said Commission, on March 12, 1928, made and rendered its opinion and order, reported in Volume 140 of I. C. C. Reports, at pages 171 and following, finding that the rates on sugar, in carloads, from points in California designated as the northern California group (which said group includes, among other points, San Francisco, Crockett, and Spreckels) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 81 cents prior to July 1, 1922, and 73 cents on and after said last-mentioned date, and that said rates on sugar from points in California designated as the southern California group (which said group includes, amont other points, Betteravia and Oxnard, California) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 79 cents prior to July 1st, 1922, and 71 cents on and after said date; and that certain of the complainants in said proceeding (including plaintiff herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon [155] and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceeding to have been reasonable; and that said complainants were entitled to repara-

tion, with interest. ~~Said report and order of said Commission in said Docket No. 16742, were and are as follows:~~ ** [156]

**[See p. 426 for Stipulation as to correct matter.]

13146

INTERSTATE COMMERCE COMMISSION

No. 16742[1]

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928.

Rates on sugar, in carloads, from California points to destinations in Arizona and from California

[1]This report also comprises No. 16770, Bashford-Burmister Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company *v.* Same; No. 16770 (Sub-No. 2), Wheeler-Perry Company *v.* Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti *v.* Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. *v.* Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), Babbitt Brothers Trading Company et al. *v.* Same; No. 16770 (Sub-No. 9), Wm. H. Dagg Mercantile Company *v.* Same; No. 17549, Phelps Dodge Mercantile Company *v.* Same; No. 17549 (Sub-No. 1), Baffert & Leon *v.* Same; No. 17466, United Verde Extension Mining Company *v.* Same; No. 17781, Simpson-Ashby Company *v.* Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company *v.* Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. *v.* Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports, 95 I. C. C. 244 and 101 I. C. C. 667.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and *R. S. Sawyer* for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and *Berne Levy* for defendants.

REPORT OF THE COMMISSION

CAMPBELL, *Chairman:*

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from (172) Califor-

nia, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925 and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respectively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, *Phoenix Chamber of Commerce* v. *A., T. & S. F. Ry. Co.*, 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas, and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate, Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential of Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from California points to Bisbee, Douglas, Clifton, Tucson, and Clarkdale, Ariz., are alleged to have been and

to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the

time of the hearings traffic from California (173) moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San Francisco the present distances to Phoenix are, respectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa

Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length, which extends from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In *Maier & Co.* v. *Southern Pacific Co.*, 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In *Fourth Section Violations in Rates on Sugar*, 31 I. C. C. 511, we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and

other points east thereof, which were lower than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso & Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition

(174) to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates, with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In *Arizona Corporation Commission* v. *A., T. & S. F. Ry. Co.*, 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents, minimum 36,000 pounds. On June 25, 1918, the main-line rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points be-

came 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers cancelled the rates to main-line and branch-line points under the lower minimum weight published in connection with roads under Federal control and, as to such roads, increase the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in *Sugar from California Points to Arizona*, 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In *Phoenix Chamber of Commerce* v. *Director General*, 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In *United Verde Mining Co.* v. *A., T. & S. F. Ry. Co.*, 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In *Sugar Cases of 1922*, 81 I. C. C. 448, fourth-section relief authorized in *Fourth Section Violations in Rates on Sugar, supra*, permitting lower rates to Chicago, Ill., and other points in the Middle

140 I. C. C. [160]

(175) West than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, *Solomon-Wickersham Co.* v. *S. M. V. R. R. Co.*, 101 I. C. C. 667, reopened and here before us on argument, the rate on sugar from California points to Bowie was found to have been and to be unreasonable to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson,

an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting in rates of 80.5 and 85.5 cents, respectively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in *Arizona Corporation Commission* v. *A. E. R. R. Co.*, 113 I. C. C. 52, and will not be further discussed here. The latter case has since been reopened. In *Arizona Cattle Growers Asso.* v. *A. Ry. Co.*, 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on the basis of 71 cents, and contends that rates to the other destinations should be graded like (176)

the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable

groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Oxnard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in *Memphis-Southwestern Investigation,* 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents.

The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In *Oklahoma Traffic Asso.* v. *A. G. S. R. R. Co.,*

113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at destination. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain

varieties of sugar (177) not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing point	Quantity	Producing point	Quantity
	Tons		*Tons*
Dyer	9,095	Tracy	8,297
Los Alamitos	2,010	Alvarado	9,580
Oxnard	15,310		
Betteravia	18,559	Total	92,917
Spreckles	30,066		

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land formerly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

	Northern California			Southern California		
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921.....	187	5,920	24	265	8,519	[illegible]
Year 1922.....	188	5,920	39.4	265	8,423	70.6
Year 1923.....	247	7,754	72.9	67	2,129	27.1
Year 1924.....	313	9,856	86	44	1,415	14
Year 1925.....	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3,029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern Cali-

fornia. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckles and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a breaking up of the present exten- (178) sive

origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups, the northern group extending from San Francisco and Crockett on the north to Spreckles on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided *Consolidated Southwestern Cases,* 123 I. C. C. 208, in which new distance scales of rates were pre-

scribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	*Cents*	*Cents*	*Miles*	*Cents*	*Cents*
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519	.....	.....	847	.....	.....
Prescott, Ariz.	526	.....	.....	782	.....	.....
Williams, Ariz.	527	.....	.....	783	.....	.....
Flagstaff, Ariz.	561	.....	.....	818	.....	.....
Clarkdale, Ariz.	563	.....	.....	820	.....	.....
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619	.....	.....	876	.....	.....
Bisbee, Ariz.	628	.....	.....	956	.....	.....
Bowie, Ariz.	634	.....	.....	961	.....	.....
Douglas, Ariz.	643	.....	.....	971	.....	.....
Holbrook, Ariz.	652	.....	.....	909	.....	.....
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92.5
From Group 7 to—						
Gallup, N. Mex.	747	.....	.....	1,004	.....	.....
Clifton, Ariz.	753	.....	.....	1,081	.....	.....
Globe, Ariz.	758	.....	.....	1,085	.....	.....
Group average	752	64	79	1,057	74	95

(179) No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increases of 25 and 33⅓ per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Albuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant as including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las

Animas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the Colorado group named as defendant herein, carries rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670 (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923, six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in *Phoenix Chamber of Com-* (180) *merce* v. *Di-*

140 I. C. C. [165]

rector General, supra, referred to as the first Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which

moved under rates approved or prescribed by us. We have several times announced that the doctrine or *res adjudicata* is not applied by us. *Goss* v. *Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed,

or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California group, respectively, 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglass, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows:

(181)

To—	From southern California group	From northern California group	To—	From southern California group	From northern California group
	Cents	*Cents*		*Cents*	*Cents*
Yuma, Ariz.	46	66	Bisbee, Ariz.	72	
Kingman, Ariz.	57	69	Bowie, Ariz.	72	
Phoenix, Ariz.	61	73	Douglas, Ariz.	72	
Tucson, Ariz.	65	77	Holbrook, Ariz.	72	
Prescott, Ariz.	65	77	Safford, Ariz.	75	
Williams, Ariz.	65	77	Gallup, N. Mex.	79	
Flagstaff, Ariz.	65	77	Clifton, Ariz.	79	
Clarkdale, Ariz.	65	77	Globe, Ariz.	79	
Winslow, Ariz.	73	84			

We further find that complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, *Commissioner*, concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

Commissioner PORTER did not participate in the disposition of this case.

ORDERS

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

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No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

(I) [168]

No. 16770 (Sub-No. 5)

Arizona Grocery Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16670 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 17549

Phelps Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

(II) [169]

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds:

To—	From southern California group	From northern California group	To—	From southern California group	From northern California group
	Cents	*Cents*		*Cents*	*Cents*
Yuma, Ariz.	46	66	Bisbee, Ariz.	72	84
Kingman, Ariz.	57	69	Bowie, Ariz.	72	84
Phoenix, Ariz.	61	73	Douglas, Ariz.	72	84
Tucson, Ariz.	65	77	Holbrook, Ariz.	72	84
Prescott, Ariz.	65	77	Safford, Ariz.	75	87
Williams, Ariz.	65	77	Gallup, N. Mex.	79	89
Flagstaff, Ariz.	65	77	Clifton, Ariz.	79	89
Clarkdale, Ariz.	65	77	Globe, Ariz.	79	89
Winslow, Ariz.	72	84			

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 14449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

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No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, *Traffic Bureau of the Phoenix Chamber of Commerce et al.* v. *A., T. & S. F. Ry. Co. et al.*, and cases consolidated therewith, and such oral argument having been had, and the commission having, on the date hereof, made and filed a new report containing its find-

ings of fact and conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and 101 I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in the southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points

in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall not exceed 72 cents per 100 pounds from the southern California group, as defined in the report of this date made a part hereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

(V)

U. S. Government Printing Office: 1928 [172]

Said list of shipments hereinbefore set forth shows in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in these causes, in accordance with the tariffs duly published and in effect at the dates of movement, and the charges which would have accrued thereon, upon the basis of the rates declared by said Commission in said last-mentioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the differences between the charges so assessed and those which would have accrued, which said last-mentioned differences constitute the amounts herein claimed by the plaintiff, exclusive of interest and fees of its attorneys and counsel.

9. Heretofore, and on the 11th day of March, 1929, the Interstate Commerce Commission duly made and rendered its supplemental order in said Docket No. 16742, and cases consolidated therewith, ordering and directing the defendants to pay unto the plaintiff the following sums, to wit:

Southern Pacific Company	2104.50
Southern Pacific Company and Santa Maria Valley Railroad Company	359.75
The Atchison, Topeka & Santa Fe Railway Company	2203.55
The Atchison, Topeka & Santa Fe Railway Company and Bay Transport Company	1251.02
The Atchison, Topeka & Santa Fe Railway Company and Southern Pacific Company	297.04

together with interest at the rate of 6 per cent per annum from the respective dates of the payment of the charges as shown on said list of shipments above set forth. Said last-mentioned order required the payment of said sums on or before April 26, 1929, and stated that the same were as reparation on account of unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to points in Arizona. Defendants have failed and [173] refused to comply with said order, or to pay said sums, or any part thereof, to the plaintiff, although demand and request therefor have heretofore been duly made by the plaintiff upon said defendants.

B. CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Court makes conclusions of law as follows:

1. That the rates and charges assessed and collected upon plaintiff's said shipments, as shown upon said list above set forth, were published and collected by authority of a formal continuing order of the Interstate Commerce Commission, and had previously been established and declared by said Commission to be not unreasonable, after formal investigation and/or were less in amount than rates which had been specifically prescribed and declared by said Commission to be not unreasonable after such formal investigation.

2. That said order of said Interstate Commerce Commission dated the 11th day of March, 1929, purporting to order and direct these defendants to

pay reparation to the plaintiff with respect to its said shipments hereinbefore listed, is null and void and of no effect, because said Commission was and is without lawful jurisdiction and authority under the Interstate Commerce Act to make said order, for the following reasons:

(a) Said Interstate Commerce Act does not vest said Commission with jurisdiction and authority to award reparation with respect to charges collected upon the basis of rates which said Commission has theretofore specifically prescribed or approved as reasonable and just for the future by a formal continuing order, or with respect to charges collected upon the basis of rates which are less in amount than rates so prescribed and/or approved as just and reasonable. [174]

(b) If said Act were so construed as to confer such jurisdiction and authority upon said Commission, it would to that extent be unconstitutional, and any and all orders made in pursuance of said purported jurisdiction would likewise be unconstitutional and void, because contrary to and forbidden by the Fifth Amendment to the United States Constitution, and particularly those portions of said Amendment which guarantee that no person shall be deprived of property without due process of law.

3. That plaintiff has failed to establish by the evidence any cause of action whatever against the defendants, or any of them, and has failed to establish that any unreasonable or unlawful rate or charge was collected upon any of its said ship-

ments, or that any reparation whatsoever is due or payable with respect to said shipments, or any of them.

4. That the plaintiff is not entitled to recovery any amount whatsoever as and for fees of its attorneys and counsel in these causes.

5. That the defendants are entitled to judgment against the plaintiff, that the plaintiff take nothing by its causes of action, or either of them, and that the complainants herein be dismissed.

WHEREFORE, defendants pray that the Court render and enter judgment in their favor in each of the causes above named in accordance herewith.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

E. W. CAMP,
JAMES E. LYONS,
A. BURTON MASON,
Of Counsel.

Dated: Phoenix, Arizona, July 8th, 1930. [175]

Endorsement on foregoing special findings of fact and conclusions of law requested by defendants:

Copy received July 8, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiffs.

Filed Jul. 8, 1930. [176]

[Title of Court and Cause—Nos. L.–695, L.–696—Phoenix.]

DEFENDANTS' EXCEPTIONS AND OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY PLAINTIFF.

Now come the defendants in the above-entitled causes, and except and object to the findings of fact and conclusions of law proposed and requested by the plaintiff in said causes, as follows, to wit:

1. Defendants except and object to the findings proposed in the preamble to plaintiff's proposed findings of fact in cause No. L.–695, upon the ground that the same are not sustained by the record herein, and are contrary to the record and the law, and upon the further ground that the same are not sufficiently clear or definite; and defendants request that paragraphs 1 and 2 of the special findings of fact requested by defendants, and filed herewith, be substituted therefor. [177]

Defendants further except and object to the findings proposed in the preamble to plaintiff's proposed findings of fact in cause No. L.–696, on the ground that the same are not sustained by the record herein, and are contrary to the record and to the law, and upon the further ground that the same are not sufficiently clear and definite; and defendants request that paragraphs 1 and 2 of the special findings of fact requested by defendants, and filed herewith, be substituted therefor.

2. Defendants except and object to the findings proposed in paragraph 2 of plaintiff's proposed findings of fact in cause No. L.–695, and in paragraph 2 of plaintiff's proposed findings of fact in cause L.–696, upon the ground that the same are not sustained by the evidence, and are contrary to the evidence and the law, and upon the further ground that the same are not sufficiently clear and definite; and defendants request that paragraph 4 of the special findings of fact requested by the defendants, and filed herewith, be substituted therefor.

3. Defendants except and object to the findings proposed in paragraphs 3, 4, 5, and 6 of plaintiff's proposed findings of fact in cause No. L.–695, and in paragraphs 3, 4, 5, and 6, of plaintiff's proposed findings of fact in cause No. L.–696, upon the ground that the same are not sustained by the evidence, and are contrary to the evidence and the law, and upon the further ground that the same are not sufficiently clear and definite; and in particular, defendants except and object to the following:

(a) To the proposed finding in each of said causes reading as follows:

> "And that said freight charges as above set forth, per 100 lbs., were and are unreasonable to the plaintiff and in violation of the Interstate Commerce Act of February 4, 1887, and the acts of Congress amendatory thereto," [178] contained in paragraph 4 of plaintiff's proposed findings of fact in each of said causes upon the ground and for the reason that said finding is not proper, and is not sustained or supported by the

evidence, and is contrary to the evidence and the law.

(b) To the proposed finding, contained in paragraph 4 of plaintiff's proposed findings of fact in cause No.L.–695, reading as follows:

> "That the just and reasonable freight rate which should have been charged on all of said shipments from said points of origin in California to said point of destination in Arizona after the 1st day of July, 1922, and up to and including the 10th day of February, 1925, of 73 cents per 100 lbs."

upon the ground and for the reason that said finding is not proper, and is not sustained or supported by the evidence, and is contrary to the evidence and to the law.

(c) To the proposed finding, contained in paragraph 4 of plaintiff's proposed findings of fact in cause No. L.–695, reading as follows:

> "That the just and reasonable freight rate which should have been charged on all of said shipments from Crockett, California, and San Francisco, California, to said point of destination, to-wit: Phoenix, Arizona, after the date of July 1, 1922, and up to and including the 5th day of February, 1925, of 73 cents per 100 lbs.; and on all of said shipments from Oxnard and Betteravia, California, to said point of destination, to-wit: Phoenix, Arizona, after the 1st day of July 1922, and up to and including the 5th day of February, 1925, of 71 cents per 100 lbs.,"

upon the ground and for the reason that said finding is not proper, and is not sustained or supported by the evidence, and is contrary to the evidence and the law; and defendants request that paragraphs 5, 6, 7 and 8, of the special findings of fact requested by defendants, and filed herewith, be substituted for said paragraphs 3, 4, 5, and 6, of plaintiff's proposed findings of fact in each of said causes.

4. Defendants except and object to the findings proposed in [179] paragraphs 7 and 8 of plaintiff's proposed findings of fact in cause No. L.–695, and in paragraphs 7 and 8 of plaintiff's proposed findings of fact in cause No. L.–696, upon the ground that the same are not sustained by the evidence, and are contrary to the evidence and the law, and upon the further ground that the same are not sufficiently clear and definite; and defendants request that paragraph 9 of the special findings of fact requested by defendants, and filed herewith, be substituted therefor.

5. Defendants except and object to the following proposed finding, to wit:

> "That by reason of said unreasonable rates and charges, and the payment thereof by the plaintiff, and by reason of the refusal of the defendants to pay said reparation so awarded by the Interstate Commerce Commission, plaintiff is damaged in the sum of $3751.61, together with interest thereon at the rate of 6% per annum, from the respective dates of payment,"

contained in paragraph 9 of plaintiff's proposed findings of fact in cause No. L.–695, upon the

ground and for the reason that said finding is not proper, and is not sustained or supported by the evidence, and is contrary to the evidence and to the law.

6. Defendants except and object to the following proposed finding, to wit:

> "That by reason of said unreasonable rates and charges and payment thereof by the plaintiff, and by reason of the refusal of defendants to pay said reparation so awarded by the Interstate Commerce Commission, plaintiff is damaged in the total sum of $3464.33, together with interest thereon at the rate of 6% per annum from the respective dates of payment,"

contained in paragraph 9 of plaintiff's proposed findings of fact in Cause No. L.–696, upon the ground and for the reason that said finding is not proper, and is not supported or sustained by the evidence, and is contrary to the evidence and the law.

7. Defendants except and object to the findings proposed in paragraph 10 of plaintiff's proposed findings of facts in cause No. L.–695, and in paragraph 10 of plaintiff's proposed findings of fact [180] in cause No. L.–696, upon the ground that the same are not sustained by the evidence, and are contrary to the evidence and the law.

8. Defendants except and object to the following proposed finding:

> "That on the 11th day of March, 1929, the Interstate Commerce Commission duly made and published its order directing and requiring

the defendants herein to pay to the plaintiff the following sums, to-wit: Atchison, Topeka & Santa Fe Railway Company, $2203.55; Atchison, Topeka & Santa Fe Railway Company and Bay Shore Transport Company, $1521.02; Atchison, Topeka & Santa Fe Railway Company and Southern Pacific Company, $297.04,"

contained in paragraph 7 of plaintiff's proposed finding of facts in cause No. L.–695, upon the ground and for the reason that said finding is not proper, and is not sustained or supported by the evidence, and is contrary to the evidence and the law; this exception and objection being particularly directed to the proposed finding that $1521.02 is ordered and directed to be paid to the plaintiff by defendants, The Atchison, Topeka & Santa Fe Railway and Bay Shore Transport Company inasmuch as the complaint, in cause No. L.–695, the agreed statement of facts, and Exhibit "A," introduced by the plaintiff upon the trial hereof, show that said amount ordered and directed to be paid by said last-mentioned defendants is not more than $1251.02.

9. Defendants except and object to the conclusions proposed in paragraph 1 of the conclusions of law requested and proposed by the plaintiff in cause No. L.–695, and in paragraph 1 of the conclusions of law requested and proposed by plaintiff in cause No. L.–696, upon the ground and for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law.

10. Defendants except and object to the conclusions proposed in paragraph 2 of the conclusions of law proposed and requested by plaintiff in cause No. L.–695, and in paragraph 2 of the conclusions of law proposed and requested by plaintiff in cause No. L.–696, upon [181] the ground and for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law.

11. Defendants except and object to the conclusions proposed in paragraph 3 of the conclusions of law proposed and requested by plaintiff in cause No. L.–695, and in paragraph 3 of the conclusions of law proposed and requested by plaintiff in cause No. L.–696, upon the ground and for the reason that the same are not sustained by the evidence or the law, and are contrary to the evidence and the law.

12. Defendants except and object to any judgment whatever being rendered or entered in favor of the plaintiff in either of the above-entitled causes.

WHEREFORE, defendants pray that the findings of fact and conclusions of law proposed and requested by plaintiff and herein excepted and objected to, be refused and rejected, and that in lieu thereof, the court do find special findings of fact and conclusions of law as requested by the defendants, which said special findings of fact and conclusions of law requested by defendants are herewith filed and presented to the Court; and that the Court do render and enter judgment in both of the

above-entitled causes, in favor of the defendants, and against the plaintiff.

Dated this 8th day of July, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Phoenix, Arizona,
Attorneys for Defendants.

E. W. CAMP,
JAMES E. LYONS,
A. BURTON MASON,
65 Market Street,
San Francisco, Calif.,
Of Counsel. [182]

Endorsement on foregoing defendants' exceptions and objections to findings of fact and conclusions of law requested by plaintiff:

Copy received July 8, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiffs.

Filed Jul. 8, 1930. [183]

[Title of Court and Cause—Nos. L.-695, L.-696—Phoenix.]

STIPULATION FOR CONSOLIDATION OF RECORD.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for plaintiff above named, and counsel for the defendants above named, that, whereas, the above-entitled cases were

consolidated for the purpose of trial, and all agreed statement of facts and all evidence taken at the trial was applicable to both cases, and as the defendants above named propose to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, IT IS STIPULATED AND AGREED that the records in the above two cases shall be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit and for the purpose of review by said Circuit Court of Appeals, or any other appellate court, and that both of the above cases shall be reviewed upon such consolidated record.

IT IS STIPULATED that for the purpose of review of both of said cases it is sufficient that one set of agreed statement [184] of facts, and one set of requested findings of fact and conclusions of law by each of the parties, and one set of findings of fact and conclusions of law by the Court, and one set of exceptions and objections to findings of fact and conclusions of law by each of the parties, if desired to be made, and one bill of exceptions, if necessary, and one set of all exhibits, and one set of assignments of error, may be filed, which shall be deemed to apply to both of said cases, and it shall not be necessary to file separate documents above named in each of said cases.

Dated this 9th day of July, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jul. 11, 1930. [185]

[Title of Court and Cause—Nos. L.-695, L.-696—Phoenix.]

ORDER FOR CONSOLIDATION OF RECORD.

In accordance with stipulation of counsel, IT IS HEREBY ORDERED that the records in the above two cases shall be consolidated for the purposes of appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of review by said United States Circuit Court of Appeals, or any other Appellate Court, and for such purpose it is sufficient that one set of agreed statement of facts, and one set of requested findings of fact and conclusions of law by each of the parties, and one set of findings of fact and conclusions of law by the Court, and one set of exceptions and objections to proposed findings of fact and conclusions of law by each of the parties, if desired to be made, and one bill of exceptions, if necessary, and one set of all exhibits, and one set of assignments of error, be filed, which shall be marked filed in Cause No. L.-695—Phoenix above named, and which shall be deemed to apply to both of said

cases; and that hereafter all orders and papers filed shall be filed in said Cause No. L.–695—Phoenix, [186] and shall be deemed to apply to both cases.

Dated this 11th day of July, 1930.

F. C. JACOBS,
District Judge.

Filed Jul. 11, 1930. [187]

In the United States District Court, for the District of Arizona.

April, 1930, Term—July 15, 1930—At Phoenix.

Hon. F. C. JACOBS, United States District Judge, Presiding.

No. L.–695—PHOENIX.

AT LAW.

ARIZONA GROCERY COMPANY, a Corporation,
Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

JUDGMENT.

This cause having come on regularly to be heard the 8th day of January, 1930; Elliott and Snell having appeared as counsel for the plaintiff, Ari-

zona Grocery Company, Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason having appeared as counsel for the defendants, Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, and Southern Pacific Company; and it having appeared that a stipulation containing an express waiver of the right to trial by jury had been signed by all of the parties and filed herein;

And a stipulation as to the facts having been filed in open court, same being designated as "Agreed Statement of Facts" and dated the 8th day of January, 1930, and signed by all of the parties by their respective counsel and further evidence having been introduced in accordance with the "Agreed Statement of Facts," and both sides having rested and said cause having been argued on behalf of the plaintiff and on behalf of the defendants, and the Court having requested the plaintiff and the defendants to file authorities and briefs on the matters and questions involved and said cause having been submitted to the Court for its consideration and decision; [202]

And on the 23d day of June, 1930, the Court having heard evidence and testimony as to the reasonableness of attorneys' fees to be allowed the plaintiff herein for the services rendered by its attorneys in the trial and determination hereof to the date of this judgment as provided by law;

And on the 15th day of July, 1930, findings of fact and conclusions of law having been filed by the Court herein as requested by the parties hereto and the Court having ordered that in accordance with

said findings of fact and conclusions of law, judgment be entered in favor of the plaintiff and against the defendant in said cause filed herein, together with costs of plaintiff incurred herein,—

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, IT IS ORDERED AND ADJUDGED AND DECREED that the defendants and each of them are indebted to the plaintiff in the principal sum of $3,751.61, together with interest thereon in the amount of $1,444.14, together with plaintiff's costs herein taxed at $1,064.94 of which $1,039.19 is adjudged by the Court to be reasonable attorneys' fees to be allowed the plaintiff for services rendered by its attorney in this matter up to the date of this judgment as provided by law; all of said above amounts to bear interest at the rate of 6 per cent per annum until paid.

Approved as to form, but not as to substance or amounts.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants. [203]

In the United States District Court for the District of Arizona.

April, 1930, Term—July 15, 1930—At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

No. L.-696—PHOENIX.

AT LAW.

ARIZONA GROCERY COMPANY, a Corporation,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,
Defendants.

JUDGMENT.

This cause having come on regularly to be heard the 8th day of January, 1930; Elliott and Snell having appeared as counsel for the plaintiff, Arizona Grocery Company, Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason having appeared as counsel for the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company; and it having appeared that a stipulation containing an express waiver of the right to trial by jury had been signed by all of the parties and filed herein;

And a stipulation as to the facts having been filed in open court, same being designated as

"Agreed Statement of Facts" and dated the 8th day of January, 1930, and signed by all of the parties by their respective counsel and further evidence having been introduced in accordance with the "Agreed Statement of Facts," and both sides having rested, and said cause having been argued on behalf of the plaintiff and on behalf of the defendants, and the Court having requested the plaintiff and the defendants to file authorities and briefs on the matters and questions involved and said cause having been submitted to the Court for its consideration and decision; [204]

And on the 23d day of June, 1930, the Court having heard evidence and testimony as to the reasonableness of attorneys' fees to be allowed the plaintiff herein for the services rendered by its attorneys in the trial and determination hereof to the date of this judgment as provided by law;

And on the 15th day of July, 1930, findings of fact and conclusions of law having been filed by the Court herein as requested by the parties hereto, and the Court having ordered that in accordance with said findings of fact and conclusions of law, judgment be entered in favor of the plaintiff and against the defendant in said cause filed herein, together with costs of plaintiff incurred herein;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that the defendants and each of them are indebted to the plaintiff in the principal sum of $2,464.33, together with interest thereon in the amount of $933.91, together with plaintiff's costs herein taxed

at $685.60 of which $675.60 is adjudged by the Court to be reasonable attorneys' fees to be allowed the plaintiff for services rendered by its attorney in this matter up to the date of this judgment as provided by law; all of said above amounts to bear interest at the rate of 6 per cent per annum until paid.

Approved as to form, but not as to substance or amounts.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants. [205]

[Title of Court and Cause—No. L.-695—Phoenix.]

NOTICE OF APPLICATION TO TAX COSTS.

To the Clerk of Said Court and Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason, Attorneys for Defendants:

Please take notice that the attorneys for the plaintiff will on the 17 day of July, 1930, at 10:00 o'clock A. M. make application to the Clerk of the court, at his office, to tax the costs incurred in said action, as provided by law; and that a memorandum of the costs and necessary disbursements in said action is attached hereto and made a part of this notice.

Dated this 15 day of July, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [206]

[Title of Court and Cause—No. L.-695—Phoenix.]

STATEMENT OF COSTS.

To the Clerk of said Court and Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason, Attorneys for Defendants:

You and each of you are hereby notified that the plaintiff, Arizona Grocery Company, claims as costs in the above-entitled cause the sum of $1064.94 for the following expenses incurred by it, viz.:

Clerk's Fees	$ 10.00
U. S. Marshal Fees	$ 15.75
Attorneys Fees as allowed by Court	$1039.19
Total	$1064.94

Plaintiff's costs $1064.94 taxed and entered this 17th day of July, 1930.

C. R. McFALL,
Clerk.
By H. F. Schlittler,
Deputy Clerk. [207]

State of Arizona,
County of Maricopa,—ss.

Frank L. Snell, Jr., being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff Arizona Grocery Company in the above-entitled cause and as said attorney is better informed as to its costs expended in the above-entitled cause than the said plaintiff; that the above items are correct,

and that the disbursements above set forth have been necessarily incurred in the above action, and that said amounts hereinabove listed have been expended or incurred for the plaintiff in said cause.

FRANK L. SNELL, Jr.

Subscribed and sworn to before me this 14th day of July, 1930.

My commission as notary public expires June 17, 1930.

[Seal] MARY CAVANAUGH,
Notary Public in and for Maricopa County, State of Arizona.

Received copy this 15th day of July, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jul. 15, 1930. [208]

[Title of Court and Cause—No. L.-696—Phoenix.]

NOTICE OF APPLICATION TO TAX COSTS.

To the Clerk of said Court and Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason, Attorneys for Defendants:

Please take notice that the attorneys for the plaintiff will on the 17th day of July, 1930, at 10:00 o'clock A. M. make application to the Clerk of the court, at his office, to tax the costs incurred in said

action, as provided by law; and that a memorandum of the costs and necessary disbursements in said action is attached hereto and made a part of this notice.

Dated this 15 day of July, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff. [209]

[Title of Court and Cause—No. L.-696—Phoenix.]

STATEMENT OF COSTS.

To the Clerk of the Said Court and Baker and Whitney, Chalmers, Fennemore and Nairn, E. W. Camp, James E. Lyons and James Burton Mason, Attorneys for Defendants.

You and each of you are hereby notified that the plaintiff, Arizona Grocery Company, claims as costs in the above-entitled cause the sum of $685.60 for the following expenses incurred by it, viz.:

Clerk's Fees	$ 10.00
Sheriff's Fees	$ —
Attorney's Fees as allowed by Court	$675.60
Total	$685.60

Plaintiff's costs $685.60 taxed and entered this 17th day of July, 1930.

C. R. McFALL,
Clerk.
By H. F. Schlittler,
Deputy Clerk. [210]

State of Arizona,
County of Maricopa,—ss.

Frank L. Snell, Jr., being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff Arizona Grocery Company in the above-entitled cause and as said attorney is better informed as to its costs expended in the above-entitled cause that the said plaintiff; that the above items are correct, and that the disbursements above set forth have been necessarily incurred in the above action, and that said amounts hereinabove listed have been expended or incurred for the plaintiff in said cause.

FRANK L. SNELL, Jr.

Subscribed and sworn to before me this 14 day of July, 1930.

My commission as notary public expires June 17, 1931.

[Seal] MARY CAVANAUGH,
Notary Public in and for Maricopa County, State of Arizona.

Received copy this 15th day of July, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

Filed Jul. 15, 1930. [211]

[Title of Court and Cause—No. L.-695—Phoenix.]

OBJECTIONS AND EXCEPTIONS TO PLAINTIFF'S STATEMENT OF COSTS.

Now come defendants above named by their attorneys of record and object and except to the following item contained in plaintiff's statement of costs, to wit:

"Attorneys' Fees as allowed by Court .....$1039.19"

upon the grounds and for the reasons that the same is not justified and is not a proper item of cost.

Dated this 17th day of July, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
E. W. CAMP,
JAMES E. LYON,
A. BURTON MASON,
Attorneys for Defendants.

Receipt of copy is hereby acknowledged this 16 day of July, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

Filed July 17, 1930. [212]

[Title of Court and Cause—No. L.-696—Phoenix.]

OBJECTIONS AND EXCEPTIONS TO PLAINTIFF'S STATEMENT OF COSTS.

Now come defendants above named by their attorneys of record and object to the following item contained in plaintiff's statement of costs, to wit:

"Attorneys' Fees as allowed by Court ..... $675.60"

upon the grounds and for the reasons that the same is not justified and is not a proper item of cost.

Dated this 17th day of July, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
E. W. CAMP,
JAMES E. LYON,
A. BURTON MASON,
Attorneys for Defendants.

Receipt of copy is hereby acknowledged this 16 day of July, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

Filed July 17, 1930. [213]

United States District Court for the District of Arizona.

October, 1929, Term at Phoenix.

Honorable F. C. JACOBS, United States District Judge Presiding.

Minute Entry of Monday—November 18, 1930.

L.–695.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

L.–969.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Defendants.

ORDER CONTINUING TIME TO ANSWER TO AND INCLUDING NOVEMBER 25, 1929.

L.–695.

IT IS ORDERED that defendant's time within which to further plead or answer herein be and the same is hereby continued to November 25, 1929, in accordance with the stipulation heretofore filed herein.

L.–696.

IT IS ORDERED that defendant's time within which to further plead or answer herein be and the same is hereby continued to November 25, 1929, in accordance with the stipulation heretofore filed herein. [214]

MINUTE ENTRY OF MONDAY, DECEMBER 2, 1929—ORDER THAT DEMURRER BE STRICKEN FROM LAW AND MOTION CALENDAR.

L.–695.

Defendants' demurrer comes on regularly for hearing this day; no counsel appears for the plaintiff. Alex B. Baker, Esq., appears as counsel for the defendant. Upon motion of said counsel,—

IT IS ORDERED that said demurrer be stricken from the law and motion calendar and continued to be reset upon motion of counsel and order of the Court.

L.–696.

Defendant's demurrer comes on regularly for hearing this day. No counsel appears for the plaintiff. Alex. B. Baker, Esq., appears as counsel for the defendant. Upon motion of said counsel,—

IT IS ORDERED that said demurrer be stricken from the law and motion calendar and continued to be reset upon motion of counsel and order of the Court.

MINUTE ENTRY OF SATURDAY, DECEMBER 21, 1929—ORDER THAT DEMURRER AND AGREED STATEMENT OF FACTS BE SET FOR HEARING JANUARY 8, 1930.

L.–696.

No counsel appears for the plaintiff herein. A. B. Baker, Esq., appears as counsel for the defendant. On motion of counsel for the defendant,—

IT IS ORDERED that the defendant's demurrer and agreed statement of facts be set for hearing January 8, 1930, at ten o'clock, A. M.

L.–695.

No counsel appears for the plaintiff herein. A. B. Baker, Esq., appears as counsel for the defendant. On motion of counsel for the defendant,—

IT IS ORDERED that the defendant's demurrer and agreed statement of facts be set for hearing January 8, 1930, at ten o'clock, A. M.

MINUTE ENTRY OF JANUARY 8, 1930—ORDER CONSOLIDATING CASES, ETC.

L.-695—L.-696.

Defendants' demurrers and agreed statement of facts come on regularly this day for hearing in each of these cases. Frank L. Snell, Esq., appears as counsel for the plaintiff, T. G. Nairn, Esq., appears as counsel for the defendant, Atchison, Topeka and Santa Fe Railway Company. A. B. Baker Esq., A. B. Mason, Esq., and J. E. Lyons, Esq., appear as counsel for the defendants Southern Pacific Company.

IT IS ORDERED that these cases be and the same are hereby consolidated and that a jury be waived upon the trial [215] hereof in accordance with the stipulation of the parties heretofore filed herein. Upon motion of counsel for the defendants,—

IT IS ORDERED that defendants' demurrer in each of these cases be and the same is hereby withdrawn. Thereupon, it is further stipulated that the record as made upon the agreed statement of facts be submitted for the Court's decision, and the following exhibits are now admitted in evidence on behalf of the plaintiff, in accordance with said stipulation.

A—Order 16742—Interstate Commerce Commission.

B—Claim 805-1—Arizona Grocery Company.

C—Claim 806-2—Arizona Grocery Company.

Thereupon, argument is now duly had by respective counsel upon said record.

The plaintiff herein now moves for judgment on said record and thereupon the defendants and each of them, move for a dismissal of these actions, and

IT IS ORDERED that said matter be submitted and taken under advisement.

IT IS FURTHER ORDERED that the plaintiff be allowed thirty days from and after this date to file brief; that the defendants be and they are hereby allowed thirty days thereafter to file reply brief and that the plaintiffs be allowed fifteen days from and after time allowed the defendants within which to file their answer to said reply brief.

MINUTE ENTRY OF THURSDAY, MARCH 27, 1930—ORDER EXTENDING TIME TO AND INCLUDING APRIL 8, 1930, TO FILE REPLY BRIEF.

L.-695.—L.-696.

IT IS ORDERED that plaintiff's time within which to file reply brief be extended to and including April 8, 1930, in accordance with the stipulation of the parties heretofore filed in each of these cases.

April, 1930, Term—At Phoenix.

MINUTE ENTRY OF MONDAY, MAY 19, 1930—ORDER OVERRULING DEFENDANTS' DEMURRER.

L.-695.

The defendants' demurrer to the complaint, having heretofore been argued, submitted and by the

Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,—

IT IS ORDERED that said defendants' demurrer to the [216] complaint be, and the same is hereby, overruled.

IT IS FURTHER ORDERED that an exception on behalf of the defendants be entered.

L.–696.

The defendants' demurrer to the complaint, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,—

IT IS ORDERED that said defendants' demurrer to the complaint be, and the same is hereby, overruled.

IT IS FURTHER ORDERED that an exception on behalf of the defendants be entered.

MINUTE ENTRY OF WEDNESDAY, MAY 28, 1930—ORDER DENYING DEFENDANTS' MOTION TO DISMISS.

L.–695.–L.–696.

The defendants' motion to dismiss, having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,—

IT IS ORDERED that said defendants' motion to dismiss be denied.

IT IS FURTHER ORDERED that an exception on behalf of each defendant be entered.

MINUTE ENTRY OF THURSDAY, JUNE 5, 1930—ORDER SETTING TIME FOR HEARING ON SETTLEMENT AND ALLOWANCE OF ATTORNEY'S FEES.

L.–695—L.–696.

On motion of F. L. Snell, Jr., Esquire, counsel for the plaintiff,—

IT IS ORDERED that hearing on settlement and allowance of attorney's fees be set for Monday, June 9, 1930, at the hour of ten o'clock A. M.

[217]

MINUTE ENTRY OF MONDAY, JUNE 9, 1930—ORDER CONTINUING HEARING ON SETTLEMENT AND ALLOWANCE OF ATTORNEY'S FEES.

L.–695—L.–696.

Hearing on settlement and allowance of attorney's fees come on regularly for this day. F. L. Snell, Jr., Esquire, appears for the plaintiff; A. E. Baker, Esquire, appears for the defendants. Upon stipulation of respective counsel—

IT IS ORDERED that hearing on settlement and allowance of attorney's fees be continued and set for Monday, June 23, 1930, at the hour of ten o'clock A. M.

MINUTE ENTRY OF MONDAY, JUNE 23, 1930 —HEARING ON SETTLEMENT AND ALLOWANCE OF ATTORNEY'S FEES.

L.-695—L.-696.

Settlement and allowance of attorney's fees comes on regularly for hearing this day. F. L. Snell, Jr., Esquire, appears for the plaintiff; T. G. Nairn, Esquire, appears as counsel for the defendant Atchison, Topeka and Santa Fe Railway Company; L. C. Whitney, Esquire, and A. B. Mason, Esquire, appear as counsel for the defendant Southern Pacific Company, and argument is now duly had by respective counsel.

F. L. Snell, Jr., and Samuel White are sworn and examined on behalf of the plaintiff.

A. B. Mason and T. G. Nairn are sworn and examined on behalf of the defendants.

Thereupon said matter is submitted to the Court and

IT IS ORDERED that the attorney's fees in each of these cases be settled and allowed in an amount equal to twenty per cent (20%) of principal and interest, to which rulings and orders of the Court the defendants except.

IT IS FURTHER ORDERED that the plaintiff herein prepare findings of fact and conclusions of law.

MINUTE ENTRY OF FRIDAY, JULY 11, 1930 —HEARING ON PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, ETC.

L.-695—L.-696.

F. L. Snell, Jr., Esquire, appears for the plaintiff; A. B. Baker, Esquire, and A. B. Mason, Esquire, appear for the defendant Southern Pacific Company.

Plaintiff's request for findings of fact and conclusions of law and defendants' request for special findings of fact and conclusions of law and exceptions and objections to plaintiff's request for findings of fact and conclusions of law come on regularly this date for hearing. Argument is now had by respective counsel, and

IT IS ORDERED that Proposed Findings 1 and 2 of defendants be substituted and adopted for the preamble of plaintiff's findings; that Proposed Findings 3 and 4 of defendants be substituted and adopted for Proposed Findings 1 and 2 of the plaintiff; that Proposed Finding 5 of defendants be substituted for Proposed Finding 3 of the plaintiff. [218]

That the Proposed Finding No. 6 of the defendants is allowed and adopted as amended to which ruling and order of the Court the defendants except. Plaintiff excepts to the adoption by the Court of said defendants' proposed finding as amended.

That the Proposed Finding No. 7 of the defendants is allowed and adopted as amended to which ruling and order of the Court the defendants except. Plaintiff excepts to the adoption by the Court of said defendants' proposed finding as amended.

That the Proposed Finding No. 8 of the defendants is allowed and adopted as amended and said finding is substituted for plaintiff's Proposed Findings Nos. 5 and 6, to which ruling and order of the Court the defendants except.

That the Proposed Finding No. 9 of the defendants is allowed and adopted and is substituted for plaintiff's Proposed Findings Nos. 7 and 8.

That the Proposed Findings Nos. 4, 6, 9 and 10 of the plaintiff are allowed and adopted as amended to which ruling and order of the Court the defendants except.

IT IS FURTHER ORDERED

That Plaintiff's Conclusions of Law Nos. 1 and 2 be allowed and adopted, to which ruling and order of the Court the defendants except.

That Plaintiff's Conclusions of Law No. 3 be allowed and adopted as amended, to which ruling and order of the Court the defendants except.

IT IS FURTHER ORDERED that the conclusions of law as proposed by the defendants be and the same are hereby denied and that judgment in each case be entered in accordance with the findings of fact and conclusions of law as adopted to which rulings and order of the Court the defendants except.

Upon stipulation of counsel, IT IS ORDERED that the decision in each case may be deemed as rendered as of June 23, 1930, and that the proposed findings of fact and conclusions of law of both the plaintiff and the defendants have been submitted in accordance with the rules of this court and that said findings of fact and conclusions of law were settled in open court.

On motion of Alex B. Baker, counsel for defendant Southern Pacific Company, IT IS ORDERED that each of the defendants have a stay of execution of judgment for a period of sixty days from and after this date and that said defendants be allowed sixty days from and after this date within which to prepare, serve and file bill of exceptions. [219]

L.-695.

IT IS ORDERED that the supersedeas and cost bond in this case be fixed in the sum of $7,500.00.

L.-696.

IT IS ORDERED that the supersedeas and cost bond in this case be fixed in the sum of $6,500.00.

L.-695—L.-696.

Upon stipulation of counsel heretofore filed herein for the consolidation of these cases for the purpose of appeal, the following order is entered:

ORDER FOR CONSOLIDATION OF RECORD.

In accordance with stipulation of counsel, it is hereby ordered that the records in the above two cases shall be consolidated for the purposes of ap-

peal in the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of review by said United States Circuit Court of Appeals, or any other appellate court, and for such purpose it is sufficient that one set of agreed statement of facts, and one set of requested findings of fact and conclusions of law by each of the parties, and one set of findings of fact and conclusions of law by the Court, and one set of exceptions and objections to proposed findings of fact and conclusions of law by each of the parties, if desired to be made, and one bill of exceptions, if necessary, and one set of all exhibits, and one set of assignments of error, be filed, which shall be marked filed in Cause No. L.–695—Phoenix above named, and which shall be deemed to apply to both of said cases; and that hereafter all orders and papers filed shall be filed in said Cause No. L.–695—Phoenix, and shall be deemed to apply to both cases.

Dated this 11th day of July, 1930.

F. C. JACOBS,
District Judge.

MINUTE ENTRY OF TUESDAY, JULY 15, 1930 —ORDER RE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

L.–695—L.–696.

F. L. Snell, Jr., Esquire, appears for the plaintiff; E. G. Nairn, Esquire, appears for the defendants, and

IT IS ORDERED that the findings of fact and conclusions of law be filed in each of these cases.

Thereupon the following judgments are entered. [220]

MINUTE ENTRY OF THURSDAY, JULY 17, 1930—ORDER OVERRULING OBJECTIONS TO RULING, ETC.

L.–695—L.–696.

F. L. Snell, Jr., Esquire, appears for the plaintiff; A. B. Baker, Esquire, appears for defendant Southern Pacific Company; T. G. Nairn, Esquire, appears for the defendant Atchison, Topeka & Santa Fe Railway Company.

Defendants' objections and exceptions to the ruling of the Clerk in allowing and taxing plaintiff's costs in each of these cases and particularly to the items of attorney's fees come on regularly for hearing this date. Argument is now had by respective counsel, and

IT IS ORDERED that said objections be overruled and that the costs in each of these cases be affirmed as allowed and taxed by the Clerk, to which order and ruling of the Court the defendants except.

MINUTE ENTRY OF MONDAY, AUGUST 25, 1930—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 7, 1930, TO FILE BILL OF EXCEPTIONS.

L.–695—L.–696.

On motion of A. B. Baker, Esquire, counsel for the defendant Southern Pacific Company,—

IT IS ORDERED that the time of the defendants in each of these cases within which to file bill of exceptions be extended to and including October 7, 1930.

IT IS FURTHER ORDERED that these cases be continued into the October, 1930, term to enable the Court to retain jurisdiction and control of each of these cases and to hear, consider, rule upon, settle and sign bill of exceptions, and to entertain, consider and rule upon any and all further proceedings in said cases.

MINUTE ENTRY OF TUESDAY, SEPTEMBER 29, 1930—ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND.

L.-695.

On this 24th day of September, 1930, came the defendants by their attorneys and filed herein, and presented to the Court their petition for the allowance of an appeal, and assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the records, proceedings, and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that citation issue; and further praying that this Court fix the amount of the costs and/or supersedeas bond to be given by the defendants in this cause; and that such other and further proceedings may be had as may be proper in the premises. [221].

NOW, THEREFORE, on consideration thereof, the Court does hereby allow the appeal as prayed for, and does hereby fix the amount of the costs and supersedeas bond in the sum of Seventy-five Hundred Dollars ($7,500.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court for the District of Arizona.

L.–696.

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND.

On this 24th day of September, 1930, came the defendants by their attorneys and filed herein, and presented to the Court their petition for the allowance of an appeal, and assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the records, proceedings, and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that citation issue; and further praying that this Court fix the amount of the costs and/or supersedeas bond to be given by the defendants in this cause; and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, on consideration thereof *thereof* the Court does hereby allow the appeal as

prayed for and does hereby fix the amount of the costs and supersedeas bond in the sum of Sixty-five Hundred Dollars ($6,500.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court, for the District of Arizona.

L.–695.

ORDER APPROVING BOND ON APPEAL.

IT IS ORDERED BY THE COURT that the bond on appeal, executed September 24, 1930, in the sum of Seventy-five Hundred ($7,500.00) Dollars, with the Pacific Indemnity Company of California as surety thereon, and filed in this case September 29, 1930, be, and the same is hereby, accepted and approved. [222]

ORDER APPROVING BOND ON APPEAL.

L.–696.

IT IS ORDERED BY THE COURT that the bond on appeal, executed September 24, 1930, in the sum of Sixty-five Hundred ($6500.00) Dollars, with the Pacific Indemnity Company of California as surety thereon, and filed in this case September 29, 1930, be, and the same is hereby, accepted and approved.

L.– 695, L.–696.

ORDER TO SETTLE AND ALLOW BILL OF EXCEPTIONS.

IT IS ORDERED that the bill of exceptions heretofore filed herein be, and the same is hereby, settled and allowed. [223]

[Title of Court and Cause—Nos. L.–695, L.–696—Phoenix.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that pursuant to the stipulations and agreed statement of facts as hereinafter recited, the above causes came on for hearing on the 8th day of January, 1930, before the Hon. F. C. Jacobs, one of the Judges of the United States District Court, in and for the District of Arizona, sitting without a jury, a jury having been expressly waived by written stipulations signed by counsel for plaintiff and defendants and filed in said causes. All of the parties appeared and announced ready for the hearing, the plaintiff appearing by its counsel Messrs, Elliott & Snell, of Phoenix, [224] Arizona, and the defendants appearing by their counsel Messrs. Baker & Whitney, and Messrs. Chalmers, Fennemore & Nairn, of Phoenix, Arizona, and Mr. A. Burton Mason and Mr. J. E. Lyons, of San Francisco, California.

And thereupon there were presented and filed in the above causes stipulations in writing signed by the attorneys for the plaintiff and the attorneys for the defendants agreeing that the above causes may be tried together and consolidating said causes for purposes of trial and hearing. Counsel for plaintiff and defendants did present and file in said causes a stipulation of agreed statement of facts, which said agreed statement of facts was in writing and signed by counsel for plaintiff and counsel for defendants and reads as follows:

(Title of Court and Cause—L.-695 and L.-696—Phoenix.)

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above-entitled actions, and by and between their respective attorneys and counsel, that upon the trial, or any trial, retrial, appeal or other hearing of said causes, the facts hereinafter set forth in this agreed statement of facts shall be deemed to be true and to have been proven in the same manner as if duly established by competent testimony; subject, however, to the right of any party to introduce such further testimony not in conflict herewith as it may desire; subject, further, to the right of either party to object to any portion of this agreed statement of facts on the ground that the same is irrelevant and immaterial to the issues in said causes:

I.

Plaintiff now is, and at all times herein mentioned was, a corporation organized and existing

under the laws of the State of Arizona, and qualified to do business in said state. [225]

II.

Defendants Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company, and Santa Maria Valley Railroad Company now are, and at all times herein mentioned have been, corporations duly organized and existing as such, and engaged in the operation of lines of railroad, pursuant to the authority of law, as common carriers for hire, and in the transportation of property by means of their lines of railroad and in conjunction with their connecting carriers, in interstate commerce from points in the State of California to points in the State of Arizona.

Defendant Bay Transport Company now is, and at all times herein mentioned was, a corporation duly organized and existing as such, and engaged in the transportation of freight by water, in interstate commerce, as a connection of the railroad corporations hereinbefore referred to.

III.

Heretofore, and at various dates between the 21st day of February, 1923, and the 5th day of February, 1925, the plaintiff shipped, or caused to be shipped, from San Francisco, Crockett, Oxnard, and Betteravia, and Spreckels, California, to Phoenix, Arizona, over the lines of said defendants, certain carload shipments of sugar; that there are annexed to the complaints on file herein, marked Exhibit "A," and by reference made a part of said

complaints, statements which correctly show in detail the dates upon which said shipments were made, the dates upon which charges for the transportation thereof were collected, the car initials and numbers of the cars in which the same were loaded, the several points of origin thereof, the several weights of said shipments, the rates thereon assessed and the charges thereon collected, the rates found by the Interstate Commerce Commission to have been reasonable, and the amounts which would have accrued under said [226] last-mentioned rates (said last-mentioned rates and amounts being shown under the column headed "As Should Be" upon said exhibit), and the amount of reparation claimed and allowed by said Commission with respect to each of said shipments.

IV.

On the 22d day of June, 1921, in a proceeding before the Interstate Commerce Commission known as Docket No. 11,532, entitled "Traffic Bureau, Phoenix Chamber of Commerce, et al., complainants v. Director General, et al., defendants," (to which proceeding Arizona Grocery Company, a copartnership, predecessor of the plaintiff herein, was a party complainant) upon a complaint alleging that the rates on sugar in carloads from points in California (including all points in said state referred to on said statements marked Exhibit "A") to Phoenix had been, were, and in the future would be, unreasonable, and in violation of the Interstate Commerce Act, and said Commission,

after due hearing and investigation duly made and rendered its opinion and order in said proceeding, which said opinion is reported in Volume 62, Interstate Commerce Commission Reports, at pages 412 and following. A true and correct copy of said report, and of said order, are annexed hereto, marked Exhibit 1, and by this reference made a part hereof. The Commission in said proceeding found that the rates on sugar, in carloads, from said points in California to Phoenix, Arizona, would in the future be unreasonable to the extent that they exceeded or might exceed 96½ cents per 100 pounds, and ordered and directed that said rates be reduced for the future, and until the further order of said Commission, to a figure not exceeding said date of 96½ cents. Thereafter, the defendants in said proceeding before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly filed and published [227] their tariffs, effective September 17, 1921, naming a rate of 96 cents per 100 pounds upon sugar, in carloads, from points in California to Phoenix, Arizona, which said rate was one-half cent less than the aforesaid rate of 96.5 cents, which said defendant carriers had been ordered by said Commission not to exceed.

Said rate of 96 cents per 100 pounds remained in effect until on or about July 1st, 1922, upon which date, in accordance with the recommendations made by said Commission in a report in proceedings known as Docket No. 13293, Reduced Rates 1922, reported in Volume 68, Interstate Commerce

Commission Reports, at pages 676 and following, said rate of 96 cents was voluntarily reduced to 86½ cents per 100 pounds; said last-mentioned rate of 86½ cents per 100 pounds was named in tariffs of said defendants herein, and of other carriers engaged in interstate commerce, and was duly and regularly filed with the Interstate Commerce Commission in accordance with law.

Said last-mentioned rate of 86½ cents per 100 pounds remained in effect until on or about January 10, 1924, upon which date the same was voluntarily reduced to 84 cents per 100 pounds; said last-mentioned rate of 84 cents per 100 pounds was duly and regularly established by these defendants and by other common carriers engaged in interstate commerce, and was named in tariffs duly and regularly filed in accordance with law.

Said rates of 86½ cents per 100 pounds and 84 cents per 100 pounds were the rates which were successfully in effect, and assessed upon complainant's shipments during the period of movement thereof. Said rates are the rates referred to "as charged" upon said statements marked Exhibit "A."

V.

Said last-mentioned rate of 84 cents per 100 pounds remained in effect until February 25, 1925, upon which date the same was [228] reduced to 71 cents per 100 pounds, pursuant to and in compliance with certain findings and orders made by said Commission in a proceeding known as Docket No. 14,449, reported in Volume 95, Interstate Com-

merce Commission Reports, at pages 244 and following, in which proceeding the Traffic Bureau of the Phoenix Chamber of Commerce, and certain others including the plaintiff, were complainants, and in which proceedings said complainants alleged that the rates on sugar from points in California, including the points of origin of the shipments of plaintiff herein, to Phoenix, Arizona, had been, were, and in the future would be, unreasonable. A true and correct copy of the Report and Order of Said Commission in said proceeding, Docket No. 14,449, is annexed hereto, marked Exhibit No. 2, and by this reference made a part hereof. In said last-mentioned proceeding, Docket No. 14,449, said Commission found and decided that said rates from California points to Phoenix had been unreasonable, in the past, to the extent that they had exceeded 79 cents per 100 pounds prior to July 1st, 1922, and 71 cents per 100 pounds subsequent to that date, and that reparation should be awarded upon shipments made by complainants in said proceeding, to the extent that the charges collected upon said shipments exceeded those which would have accrued at said rates therein declared to have been reasonable; in said proceeding the Commission further made its order requiring the defendants therein, including the defendants in these causes, to establish, and maintain for the future until the further order of the Commission, rates not exceeding 71 cents per 100 pounds from all points in California to Phoenix, Arizona; said last-mentioned rate of 71 cents per 100 pounds was

duly established in compliance with said order on or about February 25, 1925, and was duly and regularly published in tariffs filed with said Commission in accordance with law. [229]

VI.

Thereafter and on February 8, 1927, said Interstate Commerce Commission reopened said proceeding, Docket No. 14,449, upon petition of the defendants therein, for oral argument jointly with a subsequent proceeding brought by the Traffic Bureau of the Phoenix Chamber of Commerce and certain others (including plaintiff) as complainants, and known as Docket No. 16,742.

In said last-mentioned proceeding, Docket No. 16,742, said Commission, on March 12, 1928, made and rendered its opinion and order, reported in Volume 140 of Interstate Commerce Commission Reports, at pages 171 and following, finding that the rates on sugar, in carloads, from points in California designated as the northern California group (which said group includes, among other points, San Francisco, Crockett, and Spreckels) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 81 cents prior to July 1st, 1922, and 73 cents on and after said last-mentioned date, and that said rates on sugar from points in California designated as the southern California group (which said group includes, among other points, Betteravia and Oxnard, California) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 79 cents prior to July 1st, 1922, and 71 cents on and after said

date; and that certain of the complainants in said proceeding (including plaintiff herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceeding to have been reasonable; and that said complainants were entitled to reparation, with interest. A true and correct copy of the report and order of said Commission in said last-mentioned proceeding, Docket No. 16,742, is annexed hereto, marked Exhibit No. 3, and by this reference made a part hereof. Said statements marked [230] Exhibit "A," annexed to the complaints on file herein, correctly show, as hereinbefore set forth, the charges actually assessed upon plaintiff's said shipments, in accordance with the tariffs duly published and in effect at the dates of movement, and the charges which would have accrued thereon upon the basis of the rates declared by said Commission in said last-mentioned opinion and order to have been the reasonable rates to have been applied at said dates of movement, together with the differences between the charges so assessed and those which would have accrued, which said last-mentioned differences constitute the amounts herein claimed by the plaintiff, exclusive of interest, and fees of its attorneys and counsel.

VII.

Heretofore, and on the 11th day of March, 1929, the Interstate Commerce Commission duly made

and rendered its supplemental order in said Docket No. 16,742, and cases consolidated therewith, ordering and directing the defendants to pay unto the plaintiff the following sums, to wit:

Southern Pacific Company	$2104.50
Southern Pacific Company and Santa Maria Valley Railroad Company	359.75
The Atchison, Topeka & Santa Fe Railway Company	2203.55
The Atchison, Topeka & Santa Fe Railway Company and Bay Transport Company	1251.02
The Atchison, Topeka & Santa Fe Railway Company and Southern Pacific Company	297.04

together with interest at the rate of 6 per cent per annum from the respective dates of payment of charges as shown on said statements marked Exhibit "A" annexed to the complaints herein. Said last-mentioned order required the payment of said sums on or before April 26, 1929, and stated that the same were as reparation on account of unreasonable rates charged for the transportation of certain carload shipments of sugar to points in Arizona from points in California. A true and correct copy of [231] said order is annexed to each of the complaints on file herein, marked Exhibit "C," and by reference made a part of said complaints. Defendants have failed and refused to comply with said order, or to pay said sums or any part thereof to the plaintiff, although demand and request

thereof have heretofore been duly made by plaintiff upon said defendants.

Dated at Phoenix, Arizona, January 8, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants. [232]

EXHIBIT No. 1.

No. 11532.

TRAFFIC BUREAU, CHAMBER OF COMMERCE, PHOENIX, ARIZ., ET AL.,

v.

DIRECTOR GENERAL, AS AGENT, SOUTHERN PACIFIC COMPANY, ET AL.

Submitted April 12, 1921. Decided June 22, 1921.

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1. Rates on sugar, in carloads, from California points to Phoenix, Ariz., found unreasonable. Reasonable rate prescribed for the future.
2. Following *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C., 368, prayer for the establishment of through routes and joint rates from San Francisco, Calif., by way of Phoenix, to points on the Southern Pacific, Maricopa, Ariz., to El Paso, Tex., denied.

Roland Johnston for complainants.

F. A. Jones for Arizona Corporation Commission, intervener.

E. W. Camp, Elmer Westlake, G. H. Baker, and *M. A. Cummings* for defendants.

REPORT OF THE COMMISSION.

Division 1, Commissioners McCHORD, AITCHISON, and LEWIS.

AITCHISON, *Commissioner:*

This case was made the subject of a proposed report by the examiner. Exceptions thereto were filed by defendants.

Complainants are the Traffic Bureau, Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, Hall-Pollock Company, and Haas-Baruch & Company, corporations, and the Arizona Grocery Company, a partnership.

The three firms named are engaged in the grocery business at Phoenix. By complaint filed June 14, 1920, they allege that the rates charged by defendants for the transportation of sugar from points in California to Phoenix, were and are unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, 3, and 4 of the interstate commerce act and section 10 of the federal control act. They ask us to prescribe just and reasonable rates for the future, to award reparation on all shipments moving subsequently to May 2, 1916, and to establish through routes and joint rates from San Francisco, Calif.,

by way of Phoenix, to Maricopa, Ariz., and points east thereof, on lines of the Southern Pacific Company, to and including El Paso, Tex. The Arizona

Exhibit No. 1, p. 1. [233]

Cor (413) poration Commission intervened on behalf of complainants. The allegation of a fourth section violation was abandoned at the hearing. Rates are stated herein in amounts per 100 pounds.

Phoenix is the only point in Arizona common to the lines of the Atchison, Topeka & Santa Fe Railway and the Southern Pacific. It is located on the branch of the Santa Fe extending south from Ash Fork, Ariz., but is served by that carrier on traffic from California by means of a branch line known as the Parker cut-off, which leaves the main line at Cadiz, Calif., and connects with the Ash Fork branch at Wickenburg, Ariz. Phoenix is served by the Southern Pacific through the medium of the Arizona Eastern Railroad, which it owns and with which it connects at Maricopa, a point on the main line 35 miles southerly from Phoenix. The short-line mileage from San Francisco to Phoenix is via the Santa Fe over the Parker cut-off; from Los Angeles, via the Southern Pacific lines.

Sugar is produced at various points in California. Hawaiian cane sugar is refined at San Francisco and at Crockett, a point 29 miles east of San Francisco on the Southern Pacific; beet sugar is produced at Alvarado, Betteravia, Spreckels, Los Alamitos, Dyer, Delhi, Oxnard, and other points in the central and southern portions of the state. For the

purpose of stating rates to Arizona, the refining and producing points of origin in California are included in one group. Rates on sugar from California are also grouped as to destination points. On the main line of the Santa Fe a destination group extends from Yucca, Ariz., to El Paso, and on the main line of the Southern Pacific from Yuma, Ariz., to El Paso. Los Angeles is the nearest point in the California group to Phoenix, and San Francisco possibly the farthest. The distances to Phoenix via the Santa Fe are 489 and 800 miles, and via the Southern Pacific, 451 and 920 miles, respectively, from the two points of origin.

On May 1, 1916, the rates on sugar from the California group to Phoenix were 60 cents, minimum weight 60,000 pounds, and 65 cents, minimum weight 36,000 pounds. Contemporaneously rates from the California group to points in the destination groups described were 5 cents lower than the corresponding Phoenix rates. This difference of 5 cents in favor of main-line points was fixed by us in *Arizona Corporation Commission* v. *A., T. & S. F. Ry. Co.*, 34 I. C. C., 158, in which we found the Phoenix rate of 75 cents, minimum 36,000 pounds, unreasonable to the extent that it exceeded, by more than 5 cents, the main-line rate to Maricopa. On June 25, 1918, these rates were increased 25 per cent, the main-line rates becoming 69 and 75 cents and the Phoenix rates 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increases, and the rates to

main-line points became 77 and 82 cents on November

62 I. C. C.

Exhibit No. 1, p. 2. [234]

(414) 25, 1919, and to Phoenix, 82 and 87 cents on February 18, 1920. On February 29, 1920, defendants canceled the rates to main-line and branch-line points, including Phoenix, under the lower minimum weight published in connection with roads under federal control and, as to such roads, increased the Phoenix rate under the minimum weight of 60,000 pounds to 83.5 cents which, apparently, was done by advancing the 5-cent difference over main-line points to 6.5 cents. In schedules filed to become effective May 14, 1920, the carriers attempted to bring the rates of nonfederal lines into harmony with those of the lines previously under federal control, but upon protest we suspended the items carrying such increases. In *Sugar from California Points to Arizona,* 58 I. C. C., 737, we held that the cancellation of the 36,000-pound minimum was justified and vacated the order of suspension. The present rates, including the general increases authorized by us on July 29, 1920, are 96.5 cents to main-line points and $1.045 to Phoenix, minimum weight 60,000 pounds. The Phoenix rate applies to practically all points on the Arizona Eastern north of Maricopa and to all points on the branch line of the Santa Fe south of Ash Fork and as far west as Parker, Ariz. There is no movement of sugar from California through Phoenix to points beyond taking lower rates.

Complainants admit that the grouping of California sugar-producing points is advantageous, as it gives them the benefit of a wide purchasing market on a uniform rate. They contend, however, that the rates to Phoenix are unreasonable, in comparison with lower rates from the California group to points involving hauls for distances which are greatly in excess of those to Phoenix. In the subjoined statement the revenues per car, per ton-mile, and per car-mile yielded by the rates to Phoenix are compared with revenues produced by certain of the rates cited by complainants. The rates shown include the general increases authorized by us on July 29, 1920.

From—	To—	Distance	Rate per 100 pounds.	Revenue. Per Car.	Revenue. Per ton-mile.	Revenue. Per car-mile.
					Mills.	*Cents.*
Los Angeles, Calif.	Phoenix, Ariz.	451	[1] $1.045	$627.00	46.3	139
San Francisco, Calif.	do	800	[1] 1.045	627.00	26.1	78.3
Betteravia, Calif.	do	655	[1] 1.045	627.00	31.9	95.7
Do	El Paso, Tex.	1,020	[1] .965	579.00	18.9	56.7
New Orleans, La.	do	1,192	[2] 1.080	388.80	18.1	32.6
San Francisco, Calif.	St. Paul, Minn.	2,154	[1] 1.025	615.00	10	28.6
Los Angeles, Calif.	Chicago, Ill.	2,231	1.09525	657.00	9.8	29.4

[1] Minimum weight 60,000 pounds. [2] Minimum weight 36,000 pounds.

Defendants take the position that the rates on sugar from California producing points to the central and eastern sections of the (415) country

62 I. C. C.

Exhibit No. 1, p. 3. [235]

are on a subnormal basis due to the necessity of marketing the California product, which greatly exceeds local consumption, in competition with sugar refined at New Orleans and Atlantic seaboard points; that a normal basis of rates would prevent the movement of California sugar because of the great disparity in distances from the competing refineries to the common markets; and that intermediate main-line points are given the benefit of these extremely low competitive rates. They attempt to justify the present rates to Phoenix on the grounds that the volume of movement is small and that market conditions present at El Paso and the other points cited by complainant are not met with at Phoenix. They argue that we recognize the potency of market competition in *Fourth Section Violations in Rates on Sugar,* 31 I. C. C., 511, by permitting the maintenance of lower rates on sugar from California to Missouri River points than those contemporaneously in effect to intermediate points on the Rock Island east of Tucumcari, N. Mex., in connection with routing, Southern Pacific to El Paso, El Paso & Southwestern to Tucumcari, Rock Island beyond. In that case we required the Southern Pacific to hold the El Paso rate from California as maximum at intermediate points, and denied the Santa Fe authority to

charge lower rates from California to Trinidad, Colo., and points east thereof than it contemporaneously maintained to intermediate points. Accordingly, these carriers reduced the main-line rates in Arizona and New Mexico to the level of the rates to El Paso and Trinidad, respectively.

A partial list of the shipments on which reparation is sought shows that 48 carloads moved during the period June, 1919, to August, 1920, inclusive, 34 being routed via Southern Pacific and 14 via Santa Fe. A statement filed by the defendants shows that during the year 1916, 1917, 1919, and the first six months of 1920, 348 cars aggregating 9,423 tons moved from California points to Arizona via Santa Fe, of which 78 cars aggregating 2,229 tons moved to Phoenix.

From Betteravia, which may be taken as fairly representative of the California group, the present rate to Phoenix yields, for a distance of 655 miles, revenues of $627 per car, 95.7 cents per car-mile, and 31.9 mills per ton-mile upon the basis of the tariff minimum weight of 60,000 pounds. A substantial volume of sugar moves from California to Phoenix in carloads. While, no doubt, relatively lower rates are justified to more distant points where the force of market competition is controlling, nevertheless, Phoenix is entitled to rates, which, measured by present-day standards, are just and reasonable. If, however, the rates to competitive points are remunerative, then clearly the rates to Phoenix are excessive, even after giving due con-

Exhibit No. 1, p. 4. [236]

(416) sideration to the volume of traffic handled to the points in question, and the character of the haul into Arizona. The rate of 96.5 cents from California is carried on the main line of the Southern Pacific for a distance of 400 miles east of Maricopa. The application of the same rate to Phoenix, but 35 miles distant from Maricopa does not appear to be unreasonable. The Southern Pacific and the Arizona Eastern are properly treated as one line in this instance. *Pacific Creamery Co.* v *S. P. Co.*, 42 I. C. C., 93, 96.

Complainants contend that the maintenance of rates from California of $1.045 to Phoenix and 96.5 cents to Tucson is unduly prejudicial to Phoenix, to the undue preference and advantage of Tucson. The record shows that Phoenix jobbers sell sugar at several points in territory contiguous to both Phoenix and Tucson, in competition with jobbers located at the latter point. While there is an indication that in some instances the Phoenix jobbers must shrink their profits to compete with Tucson, there is no evidence to show that this results from the difference in rates from California to the two competing points.

Complainants' request for the establishment of through routes and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the lines of the Southern Pacific to and including El Paso is substantially the same as was made in *Phoenix Chamber of Commerce* v. *Director General*, 62 I. C. C., 368, and the evidence is identical by reason of the stipulation into this record of

the testimony there introduced. In that case we found that the proposed arrangement had not been shown to be necessary or in the public interest and denied the petition. There is no basis for a different finding on this record.

We find that the rates attacked were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents. There is no evidence of record that complainants made shipment of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher than those herein found reasonable. In the event that such shipments were made, complainants should file statements under rule V of the Rules of Practice, showing the details of such shipments, accompanied by appropriate proof in the form of an affidavit that the shipments were made and that the freight charges were paid and borne by complainants. If defendants object to proof in the form of an affidavit they may request a further hearing with respect to the subject matter thereof.

The prayer for a through route and joint rates from San Francisco by way of Phoenix to Maricopa and points east thereof on the line of the Southern Pacific, to and including El Paso, is denied.

An appropriate order will be entered.

62 I. C. C.

Exhibit No. 1, p. 5. [237]

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 22d day of June, A. D. 1921.

No. 11532.

Traffic Bureau of the Chamber of Commerce, Phoenix, Ariz.; Hall-Pollock Company, Phoenix, Ariz.; Haas-Baruch & Company, Incorporated, Phoenix, Ariz.; The Melczer Company, Phoenix, Ariz.; and The Arizona Grocery Company, Phoenix, Ariz.

v.

James C. Davis, Director General of Railroads, as Agent; Southern Pacific Company; Arizona Eastern Railroad Company; and The Atchison, Topeka and Santa Fe Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, on or before September 17, 1921,

and thereafter to abstain, from publishing, demanding, or collecting their present rates for the transportation of sugar in carloads from California points to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 17, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar in carloads from California points to Phoenix, Ariz., rates which shall not exceed 96.5 cents per 100 pounds.

It is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 1.

[Seal.] GEORGE B. McGINTY,

Secretary.

Exhibit No. 1, p. 6. [238]

EXHIBIT No. 2.

10081

INTERSTATE COMMERCE COMMISSION

No. 14449

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

26875—25

Washington: Government Printing Office: 1925

Exhibit No. 2, p. 1. [239]

No. 14449

TRAFFIC BUREAU OF THE PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted July 14, 1923. Decided January 6, 1925

Rate on sugar, in carloads, from California points to Phoenix, Ariz., found to have been and to be unreasonable, but not unjustly discriminatory, or unduly prejudicial. Reasonable rate for the future prescribed, and reparation awarded.

Roland Johnston for complainants.

E. W. Camp, Chalmers, Stahl Fennemore & Longan, James R. Bell, F. H. Wood, F. B. Austin, G. B.

Durbrow, Elmer Westlake, James E. Lyons and *G. P. Bullard* for defendants.

Roland Johnston, D. R. Johnson, and *L. G. Reif* for Arizona Corporation Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainants to the report proposed by the examiner. We have reached conclusions differing from those proposed by him.

Complainants are the Traffic Bureau of the Chamber of Commerce, Phoenix, Ariz., an organization of shippers and citizens of Phoenix, and Haas-Baruch & Company, Hall-Pollock Company, the Melczer Company, and James A. Dick Company, corporations, engaged in the wholesale grocery business at Phoenix. By complaint filed November 3, 1922, they allege that the rates on sugar, minimum 80,000 pounds, from San Francisco and other points in California to Phoenix are, and since February 17, 1921, have been unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of the long-and-short-haul provision of the fourth section. The prayer is for reasonable and nonprejudicial rates for the future, and reparation on past shipments. The Arizona Corporation Commission intervened on behalf of complainants and the El Paso Chamber of Commerce also intervened. The rates will be stated in amounts per 100 pounds.

Exhibit No. 2, p. 2. [240]

(245) Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ashfork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashfork-Phoenix branch, approximately 54 miles north of Phoenix. Traffic from California moving over the Southern Pacific reaches Phoenix through the medium of the Arizona Eastern Railway, which connects with the Southern Pacific at Maricopa, 35 miles southerly from Phoenix. The points of production extend from San Francisco on the north to Los Angeles on the south and include a number of points where Hawaii and California beet sugar is refined. For the purpose of stating rates on sugar to Arizona, the refining points are included in one group and Arizona points are also grouped. The destination group includes all points on the main line of the Santa Fe from Yucca, Ariz., to El Paso, Tex. It also includes points on the main line of the Southern Pacific from Yuma, Ariz., to El Paso, but the fifth-class rates are observed as maxima, which produces rates at Yuma and a few contiguous points slightly lower than the commodity rate. The distances to Phoenix over the Santa Fe are 489 and 800 miles, and over the Southern Pacific 451 and 921 miles, from Los Angeles and San Francisco, respectively, the nearest and most distant refining points. Using the shorter of the two routes in each

instance, the average distance from Los Angeles and San Francisco to Phoenix is about 625 miles. The complainants presented exhibits purporting to show that the average short-haul distance from the points of origin involved to Phoenix is approximately 581 miles.

From September 17, 1921, to and including June 30, 1922, a rate of 96 cents, minimum 60,000 pounds, applied on sugar from the California points to Phoenix. On the latter date it was reduced under the general reductions of 1922 to 86.5 cents. The 86.5-cent rate also applied to practically all mainline points on the Southern Pacific from the California State line to El Paso, Tex., inclusive, including Tucson, Ariz., said to be a point competitive with Phoenix. Following the general reductions of 1922, the defendants until recently maintained rates on sugar ranging from 79 cents at St. Louis, Mo., and Chicago, Ill., and a number of points grouped therewith, to 83 cents at Burlington, Iowa, and points grouped therewith, minimum 80,000 pounds. To the same territory somewhat higher rates subject to a minimum of 60,000 pounds were maintained, the (246) rate to Chicago being 91

95 I. C. C.

Exhibit No. 2, p. 3. [241]

cents. Complainants contend that the rate to Phoenix should not exceed the rates to the more distant points, and, in fact, should be lower than the rates to El Paso and Tucson, reflecting the shorter hauls to Phoenix than to El Paso and Tucson. The rates to the latter points apply in con-

nection with a 60,000 pounds minimum, the same as to Phoenix.

At the hearing, the complainants offered testimony intended to show unjust discrimination and undue prejudice against Phoenix and preference for Tucson, which consisted principally of a comparison of the carload rates to and the less-than-carload rates beyond Phoenix, with the rates to and beyond Tucson. It was claimed that Tucson merchants have some advantage over merchants at Phoenix under the in-and-out rates. The outbound rates from Phoenix to Southern Pacific points are on a two-line basis, while the rates from Tucson to the same points are on a lower one-line basis prescribed by the Arizona Corporation Commission, and the differences in the total in-and-out rates are represented by the differences in the outbound rates. Outbound shipments from Tucson to points on the Arizona Eastern apparently are often handled by motor trucks rather than by rail. No further discussion will be made of the Tucson situation inasmuch as the complaint appears to raise the issue of undue prejudice and discrimination only as to points east of Phoenix to which the rates were lower than to that point. No evidence of direct competition between Phoenix, on the one hand, and points alleged in the complaint to be preferred, on the other appears of record.

Complainants' evidence in support of their allegation of unreasonableness consists principally of comparisons with rates on sugar from California to representative points in the Middle West such as

Burlington and Chicago, and from Sugarland, Tex., New Orleans, La., and Colorado points to El Paso and Phoenix. At the time of the hearing, many of these rates were in issue in *Sugar Cases of 1922,* 81 I. C. C. 448, decided July 14, 1923. In that decision fourth-section relief authorized by *Fourth Section Violations in Rates on Sugar,* 31 I. C. C. 511, permitting lower rates to Chicago and other Middle West points than to intermediate points, was withdrawn. The rates have subsequently been revised in conformity with the fourth section, the rate to Chicago becoming 84 cents, minimum 80,000 pounds, which rate is not exceeded at intermediate points. A rate of 84 cents has accordingly been established to Phoenix and points on the Southern Pacific in Arizona and New Mexico, and to El Paso, in connection with which rate a minimum of 60,000 pounds has been maintained.

95 I. C. C.

Exhibit No. 2, p. 4. [242]

(247) The following table shows a comparison of the present rate on sugar to Phoenix with rates offered by the complainants as indicating the unreasonableness of the rate under attack:

From—	To—	Distance	Rate	Minimum weight	Car-mile earning	Ton-mile earning
		Miles	*Cents*	*Pounds*	*Cents*	*Mills*
California	Phoenix	625	84	60,000	80.64	26.9
Sugarland	El Paso	804	71	36,000	31.79	17.66
New Orleans	do	1,193	86	36,000	25.95	14.42
Lamar, Colo	do	749	80.5	36,000	38.69	21.49
California	do	1,054	84	60,000	47.8	15.9
Do	Tucson	741	84	60,000	68.0	22.7

It is probable that the car-mile earnings shown, being based upon varying minimum weights, do not properly reflect the relative situation existing as to actual movements. The record does not, however, show the actual loading.

In *Memphis-Southwestern Investigation*, 77 I. C. C. 473, we prescribed for application in the general territory comprising Louisiana, Arkansas, and southern Missouri a distance scale of rates on sugar in which the rate for 625 miles is 58 cents. The present rate from California to Phoenix is approximately 43 per cent higher. In *Arizona Packing Co.* v. *A. E. R. R. Co.*, 81 I. C. C. 115, we prescribed on livestock, packing-house products, and fresh meats scales of rates to and from points in Arizona higher than scales also prescribed by us in Arkansas, Oklahoma, Louisiana, and Texas, known as the 1716 scales, but generally less than 30 per cent in excess of those rates. In that case we said, at page 120, with respect to rates from points in Arizona to points in California on beef cattle, sheep, and goats prescribed by us in *American National Live Stock Asso.* v. *S. P. Co.*, 26 I. C. C. 37:

> As originally prescribed, that scale was about 30 per cent higher than the 1716 scale, but this spread has been considerably narrowed in the course of general increases and reductions which have since been made. Rates based on the Arizona-California scale have been voluntarily established by the Santa Fe to points in Arizona from stations in New Mexico on its line west of Albuquerque.

The average revenue per ton-mile and per car-mile for the Atchison, Topeka & Santa Fe (entire line) for 1921 are shown as 16.42 mills and 29.96 cents, respectively, for an average haul of 331.69 miles. Similar figures for the Southern Pacific (Pacific system) are for revenue per ton-mile 17.31 mills, revenue per car-mile 34.93 cents, and average haul 288.51 miles. The figures for 1921 do not include the general reduction of 10 per cent made in 1922.

Defendants direct attention to the relatively small consuming markets in Arizona for sugar, and show that the total movement (248) to Phoenix is

Exhibit No. 2, p. 5. [243]

somewhat less than 100 carloads per annum. They further contend that there is no necessity, commercially or otherwise, for the establishment of lower rates on a minimum of 80,000 pounds than on a minimum of 60,000 pounds.

The rates on sugar from California points to Phoenix have been before the commission in a number of cases. In *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412, the commission found that the then existing rate of $1.045 to Phoenix was unreasonable to the extent that it exceeded 96.5 cents which contemporaneously applied to Tucson, Maricopa, Ariz., and other Southern Pacific main-line points. The circumstances under which the rates on sugar were established and the conditions surrounding its transportation to Phoenix are fully set out in that case and need not be further discussed here.

We find that the rates assailed have not been shown to be unjustly discriminatory or unduly preferential or prejudicial, but we find the rate from California points involved to Phoenix to have been and to be unreasonable to the extent that it exceeded and exceeds 79 and 71 cents per 100 pounds, respectively, prior and subsequent to July 1, 1922, minimum 60,000 pounds. We further find that complainants, Haas-Baruch & Company, Hall-Pollock Company, and the Melczer Company, made shipments and paid and bore charges thereon at the rate herein found unreasonable; that they have been damaged to the extent that the charges paid exceeded those that would have accrued at the rate herein found reasonable; and that they are entitled to reparation with interest. Complainants, Haas-Baruch & Company, Hall-Pollock Company, and the Melczer Company should comply with Rule V of the Rules of Practice.

An order for the future will be entered.

HALL, *Commissioner,* dissenting:

Some of these complainants came before us in June, 1920, attacking the rates on sugar, in carloads, from the California refineries to Phoenix, and asking for reparation, just as they do here. The carload minimum then, as now, was 60,000 pounds. We found the rate unreasonable to the extent that it exceeded 96.5 cents, which we then prescribed for the future. That decision was made June 22, 1921. *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412. They now come by complaint filed November 3, 1922, and allege that a rate on the same traffic of 96 cents, 0.5 cent lower than that

so prescribed, has been unreasonable since February 17, 1921, four months prior to our former decision, and again ask reparation. Meantime, on July 26, 1922, we had found not unreasonable a rate of 96.5 cents, minimum 60,000 pounds, from California refining points to destinations in Nevada and Utah for hauls ranging from 419 to 823 miles, (249) as

95 I. C. C.

Exhibit No. 2, p. 6. [244]

compared with the hauls here considered ranging from 489 to 800 miles over the Santa Fe, and 451 to 921 miles over the Southern Pacific. *Nevada Public Service Commission* v. *S. P. Co.*, 73 I. C. C. 240. That rate also was reduced by the carriers to 96 cents. The general 10 per cent reduction of July 1, 1922, brought this reasonable rate down to 86.5 cents and later, in the general sugar readjustment, the carriers established to Phoenix a rate of 84 cents, minimum 60,000 pounds. All of these were lower than what we had found reasonable and prescribed.

The majority do not reverse those decisions. They do not show change in circumstances and conditions but refer to them as "fully set out" in *Phoenix Chamber of Commerce* v. *Director General, supra.* And yet they find unreasonable rates lower than the rate prescribed in that case, and award reparation to a level 1½ cents lower than that found reasonable, for a period which begins four months before that case was decided.

The rate of 84 cents, minimum 80,000 pounds, established January 11, 1924, as a result of our findings in *Sugar Cases of 1922*, 81 I. C. C. 448,

in which we declined to continue fourth-section relief as to rates to Chicago, Ill., is blanketed from Chicago to and beyond Phoenix. The rate to Chicago under the 60,000-pound minimum is 91 cents. Comparison of the rates to the nearest and farthest points in a rate blanket of this extent is futile. The rate of 84 cents to Chicago is necessary if California sugar, concededly far exceeding the local demands, is to find a market in the Middle West in competition with sugar from refineries on the Atlantic seaboard and Gulf of Mexico. Other and broader blankets respond, like this, to the marketing demands of Pacific coast commodities. They should not be lightly disturbed.

For the average distance of 625 miles to Phoenix this 84-cent rate earns 26.8 mills per ton-mile, which compares favorably with 27.3 mills per ton-mile under the average present rate of 82 cents from California refineries to destinations in Nevada and Utah considered in the *Nevada case, supra,* for an average distance of 600 miles. There the annual movement was shown to be 79 carloads and here less than 100. The majority ignore these comparisons but rest on others less pertinent.

There is no evidence as to the volume of movement under the rates to El Paso from the refineries at Sugarland, Tex., New Orleans, La., and Lamar, Colo., or as to transportation conditions generally. A witness for defendants testified that the rates to El Paso reflect competition from these three refining points and that in this respect El Paso is comparable to Chicago, where the rates are depressed by competition from the Atlantic, the Pa-

cific, and the Gulf (250) refineries. Nor is there

95 I. C. C.

Exhibit No. 2, p. 7. [245]

any evidence that conditions surrounding movement of sugar in this territory are such as to warrant comparison with the Memphis-Southwestern scale. Lacking that evidence we look in vain to *Arizona Packing Co.* v. *A. E. R. R. Co.*, 81 I. C. C. 115, cited by the majority.

The reasonableness of the basis prescribed is not self-demonstrative. Nor is this failure of demonstration supplied by the evidence of record, by the comparison with the Memphis-Southwestern scale, injected by the majority, or by the necessities of the case. Under such circumstances the complaint should be dismissed. I am authorized by Chairman AITCHISON and Commissioners ESCH and LEWIS to say that they concur in this expression of dissent.

95 I. C. C.

Exhibit No. 2, p. 8. [246]

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of January, A. D. 1925.

No. 14449.

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; The Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 25, 1925, and thereafter to abstain, from publishing, demanding, or collecting their present rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 25, 1925, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., rates which shall not exceed 71 cents per 100 pounds, minimum 60,000 pounds.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

Exhibit No. 2, p. 9. [247]

EXHIBIT No. 3

13146

INTERSTATE COMMERCE COMMISSION

No. 16742[1]

TRAFFIC BUREAU OF PHOENIX CHAMBER OF COMMERCE ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted April 6, 1927. Decided March 12, 1928

Rates on sugar, in carloads, from California points

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[1]This report also comprises No. 16770, Bashford-Burmister Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 1), Central Commercial Company *v.* Same; No. 16770 (Sub-No. 2), Wheeler-Perry Company *v.* Santa Maria Valley Railroad Company et al.; No. 16770 (Sub-No. 3), T. F. Miller Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 4), E. F. Sanguinetti *v.* Southern Pacific Company et al.; No. 16770 (Sub-No. 5), Arizona Grocery Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 6), Arizona Wholesale Grocery Company et al. *v.* Arizona Eastern Railroad Company et al.; No. 16770 (Sub-No. 7), C. N. Cotton Company *v.* Atchison, Topeka & Santa Fe Railway Company et al.; No. 16770 (Sub-No. 8), [illegible] Brothers Trading Company et al. *v.* Same; No. 16770 (Sub-No. [illegible] H. Dagg Mercantile Company *v.* Same; No. 17459, Phelps Dodge [illegible]antile Company *v.* Same; No. 17549 (Sub-No. 1), Baffert & Leon *v.* Same; No. 17466, United Verde Extension Mining Company *v.* Same; No. 17781, Simpson-Ashby Company *v.* Southern Pacific Company; and Nos. 14140, Solomon-Wickersham Company *v.* Santa Maria Valley Railroad Company et al., and 14449, Traffic Bureau, Phoenix Chamber of Commerce et al. *v.* Atchison, Topeka & Santa Fe Railway Company et al., reopened for argument.

to destinations in Arizona and from California and Colorado points to Gallup, N. Mex., found unreasonable. Reasonable rates prescribed and reparation awarded. Original findings in Nos. 14449 and 14140 modified in part. Former reports 93 I. C. C. 244 and 101 I. C. C. 667.

Roland Johnston, Chas. E. Blaine, Calvin L. Blaine, F. W. Pullen, and *R. S. Sawyer* for complainants.

James R. Bell, G. H. Muckley, James E. Lyons, H. H. McElroy, A. Burton Mason, J. L. Fielding, Del W. Harrington, E. W. Camp, Platt Kent, F. W. Mielke, and *Berne Levy* for defendants.

REPORT OF THE COMMISSION

CAMPBELL, *Chairman:*

These cases are related and will be disposed of in one report. Defendants in all of the cases and complainants in Nos. 16742, 16770, and Sub-Nos. 1, 3, 4, 5, and 9 filed exceptions to the proposed report of the examiners, and defendants replied to complainants' exceptions. The cases were orally argued before us.

In these complaints it is alleged that the rates on sugar, in carloads, from California points to destinations in Arizona and from (172) California, Kansas, and Colorado points to Gallup, N. Mex., were and are unreasonable and in some instances unduly prejudicial and preferential. We are asked to prescribe just and reasonable rates for the future

and to award reparation. Rates and rate differences are stated in amounts per 100 pounds.

In No. 16742, filed February 9, 1925, and No. 17781, filed informally March 16, 1925, and formally November 27, 1925, reparation is asked, respectively, on shipments from California points to Phoenix to the basis of the rate of 71 cents found reasonable on and after July 1, 1922, in No. 14449, *Phoenix Chamber of Commerce* v. *A., T. & S. F. Ry. Co.*, 95 I. C. C. 244, reopened for argument with these consolidated cases.

In No. 16770 (Sub-Nos. 1 to 9), filed on various dates from February 17 to May 5, 1925, inclusive, it is alleged that the rates from California points to Prescott, Kingman, Tucson, Clarkdale, Yuma, Bowie, Safford, Globe, Flagstaff, Winslow, and Holbrook, Ariz., and from California, Kansas, and Colorado points to Gallup were and are unreasonable. There are also allegations that the rates assailed were and are unduly prejudicial to Tucson and unduly preferential of Phoenix; unduly prejudicial to Bowie, Safford, and Globe and unduly preferential of Phoenix and other points taking the same rate Lordsburg and Deming, N. Mex., and El Paso, Tex.; unduly prejudicial to Gallup and unduly preferential to Albuquerque, N. Mex., and El Paso; and unduly prejudicial to Kingman, Flagstaff, Winslow, and Holbrook and unduly preferential of Albuquerque and Phoenix.

In Nos. 17549, 17549 (Sub-No. 1), and 17466, filed, respectively, on September 3, 1925, February 9, 1926, and August 24, 1925, the rates from Califor-

nia points to Bisbee, Douglas, Clifton, Tucson, and Clarksdale, Ariz., are alleged to have been and to be unreasonable and also unduly preferential of Phoenix and other points.

No. 16742 and No. 16770 (Sub-Nos. 1 to 9) were heard together. Nos. 17549, 17549 (Sub-No. 1), and 17466 were heard together. The parties in No. 17781 agreed to submission of the case upon the record in Nos. 17549, 17549 (Sub-No. 1), and 17466, except as to proof of payment of freight charges.

Phoenix is the only point in Arizona served by both the Atchison, Topeka & Santa Fe, hereinafter referred to as the Santa Fe, and the Southern Pacific. It is at the terminus of a branch line of the Santa Fe extending south from Ash Fork, Ariz., 194 miles, but California traffic over the Santa Fe is handled over a branch line, known as the Parker cut-off, extending from Cadiz, Calif., to Wickenburg, Ariz., a point on the Ashford-Phoenix branch, approximately 54 miles north of Phoenix. At the

time of the hearings traffic from California (173) moving over the Southern Pacific reached Phoenix over the former Arizona Eastern Railroad, which connects with the main line of the Southern Pacific at Maricopa, Ariz., 35 miles south of Phoenix. Since the hearings the Southern Pacific has opened its new line from Wellton, Ariz., to Phoenix. The distances over this new line are 25 miles shorter than via Maricopa. From Los Angeles and San Francisco the present distances to Phoenix are, re-

spectively, 489 and 800 miles over the Santa Fe and 426 and 896 miles over the Southern Pacific.

Kingman, Williams, Flagstaff, Winslow, Holbrook, and Gallup are on the main line of the Santa Fe. Clarkdale is at the terminus of a branch line of the Santa Fe, 38 miles in length, which extends from Drake, Ariz., a point 21 miles south of Ash Fork on the Maricopa-Phoenix line.

Yuma, Tucson, and Bowie are on the main line of the Southern Pacific. Safford and Globe are on a branch line of that carrier extending from Bowie. Clifton is on a branch line of the same carrier extending from Lordsburg. Bisbee and Douglas are served by the so-called southern lines of the Southern Pacific, formerly the El Paso & Southwestern.

The California points of production extend from San Francisco on the north to Los Angeles on the south. They include San Francisco and Crockett, the only two points at which Hawaiian cane sugar is refined, as well as all points at which beet sugar is produced. All California refining points take the same rates to Arizona destinations.

In *Maier & Co.* v. *Southern Pacific Co.*, 29 I. C. C. 103, decided January 6, 1914, a rate on sugar from Los Angeles and Los Alamitos, Calif., to Benson, Ariz., of 60 cents, minimum 36,000 pounds, was prescribed. This was the contemporaneous rate to El Paso, a point more distant than Benson on the same line. The 60-cent rate was established generally to main-line Southern Pacific and Santa Fe points in Arizona and New Mexico, and the San Francisco rate was made 10 cents higher.

In *Fourth Section Violations in Rates on Sugar,* 31 I. C. C. 511 we denied authority to continue rates on sugar from San Francisco and other sugar-producing points in California to Trinidad, Colo., and other points east thereof, which were lower than the rates concurrently applicable on like traffic to intermediate points on the line of the Santa Fe, and also denied authority to the Southern Pacific, El Paso & Southwestern, and Chicago, Rock Island & Pacific to continue lower rates on sugar from the points of production described to the Missouri River than the rates concurrently applicable to intermediate points west of Tucumcari, N. Mex. In addition

Exhibit No. 3, p. 3. [250]

(174) to making substantial reductions in the rates in connection with the minimum of 36,000 pounds, the carriers on November 15, 1914, established rates, with a minimum of 60,000 pounds, from all California producing points to practically all Arizona points on a basis 5 cents lower than the rates from Los Angeles to the same destinations upon the lower minimum.

In *Arizona Corporation Commission* v. *A., T & S. F. Ry. Co.,* 34 I. C. C. 158, the rates from California to Phoenix and Prescott were found to be unreasonable to the extent that they exceeded the rates to the main-line junction points by more than 5 cents. As a result, on May 1, 1916, the rates from California to Phoenix and Prescott became 60 cents, minimum 60,000 pounds, and 65 cents minimum 36,000 pounds. On June 25, 1918, the main-line

rates were increased 25 per cent to 69 and 75 cents, respectively, and the Phoenix and Prescott rates became 75 and 81.5 cents. Subsequently a flat increase of 22 cents was substituted for the percentage increase and the rates to main-line points became 77 and 82 cents on November 25, 1919, and to Phoenix and Prescott 82 and 87 cents on February 18, 1920.

On February 29, 1920, the carriers cancelled the rates to main-line and branch-line points under the lower minimum weight published in connection with roads under Federal control and, as to such roads, increased the Phoenix and Prescott rate under the minimum of 60,000 pounds to 83.5 cents. This cancellation, as to nonfederal lines, was found justified in *Sugar from California Points to Arizona,* 58 I. C. C. 737.

On August 26, 1920, the rates on sugar from California, minimum 60,000 pounds, became 96.5 cents to main-line points and $1.045 to Phoenix and Prescott. In *Phoenix Chamber of Commerce* v. *Director General,* 62 I. C. C. 412, decided June 22, 1921, the Phoenix rate was found unreasonable to the extent that it exceeded 96.5 cents, and reparation was awarded on that basis. On June 27, 1921, the carriers reduced the main-line rates to 96 cents, and on September 17, 1921, that rate was established to both Phoenix and Prescott. All of these rates were reduced on July 1, 1922, to 86.5 cents.

In *United Verde Mining Co.* v. *A., T. & S. F. Ry. Co.,* 88 I. C. C. 5, the rates on classes and commodities, including sugar, from California, among

other origin territories, to Clarkdale were found unreasonable to the extent that they exceeded the contemporaneous rates to Drake, and on October 16, 1922, the rate on sugar from California to Clarkdale was reduced from $1.16 to 86.5 cents.

In *Sugar Cases of 1922,* 81 I. C. C. 448, fourth-section relief authorized in *Fourth Section Violations in Rates on Sugar, supra,* permitting lower rates to Chicago, Ill., and other points in the Middle

Exhibit No. 3, p. 4. [251]

(175) West than to intermediate points, was withdrawn. In the revision following this decision the rate to Chicago, minimum 80,000 pounds, became 84 cents, and this rate was established at intermediate points, including Gallup and main-line Southern Pacific and Santa Fe points in Arizona, but in connection with a minimum of 60,000 pounds. The same rate and minimum were established to Phoenix, Prescott, and Clarkdale.

In our original report in No. 14449 we again considered the rate from California points to Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, respectively, prior and subsequent to July 1, 1922. Reparation was awarded on that basis. The 71-cent rate was established to Phoenix and to intermediate points on the Southern Pacific and on the route of the Santa Fe over the Parker cut-off, effective February 25, 1925. In our original report in No. 14140, *Solomon-Wickersham Co.* v. *S. M. V. R. R. Co.,* 101 I. C. C. 667, reopened and here before us

on argument, the rate on sugar from California points to Bowie was found to have been and to be unreasonable to the extent that it exceeded 83 and 75 cents, respectively, before and after July 1, 1922. Reparation was awarded on that basis. The reduced rate was established to Bowie and to Tucson, an intermediate point, effective October 27, 1925. The reduction to Bowie was 9 cents, and on the date named the Southern Pacific made reductions of the same amount to Safford and Globe, resulting in rates of 80.5 and 85.5 cents, respecively. No change was made in the Clifton rate of 94.5 cents.

Summarized, the present rates, minimum 60,000 pounds, are 71 cents to Yuma and Phoenix, 75 cents to Tucson and Bowie, 80.5 cents to Safford, 84 cents to Kingman, Williams, Flagstaff, Winslow, Holbrook, Prescott, Clarkdale, Bisbee, Douglas, and Gallup, 85.5 cents to Globe, and 94.5 cents to Clifton.

The general transportation conditions from California to Arizona are fully discussed in the cases cited and also in *Arizona Corporation Commission* v. *A. E. R. R. Co.,* 113 I. C. C. 52, and will not be further discussed here. The latter case has since been reopened. In *Arizona Cattle Growers Asso.* v. *A. Ry. Co.,* 101 I. C. C. 181, division 4 approved of prescribed rates on cattle, in carloads, from points in Arizona to points in California which were approximately 20 per cent higher than the corresponding rates for like distances in Oklahoma and Texas. The same level of rates was approved or prescribed in that case from branch-line as from main-line points in Arizona.

In Nos. 16742, 16770, and 16770 (Sub-Nos. 1 to 9) counsel asks reparation on shipments to Phoenix on the basis of 71 cents, and contends that rates to the other destinations should be graded like (176)

Exhibit No. 3, p. 5. [252]

the rate to Bowie prescribed in the first report in No. 14149, or else that there should be reasonable groupings. In Nos. 17549, 17549 (Sub-No. 1), and 17466 counsel contends that the origin group should be divided into two parts, the first to include Los Angeles, Dyer, Los Alamitos, San Pedro, and Oxnard, and the second San Francisco, Betteravia, Spreckles, Tracy, Alvarado, and Crockett. The principal counsel in the latter cases is also counsel for complainants in No. 16770 (Sub-Nos. 6, 7, and 8). The rates now suggested from the proposed southern group are 54 cents to Phoenix, Tucson, and Clarkdale, 59 cents to Bisbee, and 64 cents to Clifton, and rates 10 cents higher from the proposed northern group.

The rate of 71 cents to Phoenix prescribed in the original report in No. 14449 was based on a distance of 625 miles, which is approximately one-half of the sum of the short-line distances from Los Angeles and San Francisco. Reference was made in that report to the fact that under the distance scale on sugar prescribed in *Memphis-Southwestern Investigation,* 77 I. C. C. 473, for application in the general territory comprising Louisiana west of the Mississippi River, Arkansas, and southern Missouri, the rate for 625 miles is 58 cents. The rate of 71 cents prescribed is about 121 per cent of 58 cents.

The rates proposed by complainants are lower than 121 per cent of the Memphis-Southwestern scale, and in justification thereof complainants point to the fact that the minimum weight prescribed in connection with that scale is 36,000 pounds, as compared with 60,000 pounds under the rates assailed. In *Oklahoma Traffic Asso.* v. *A. G. S. R. R. Co.*, 113 I. C. C. 635, the Memphis-Southwestern scale was prescribed on sugar from New Orleans, La., and points in Louisiana taking the same rates, and from Sugarland and Texas City, Tex., to points in Oklahoma, subject to a minimum of 60,000 pounds.

Defendants are opposed to a disturbance of the origin grouping and to grading of rates at destination. They contend that because of the competitive situation the present origin and destination groupings are of advantage to producers and distributors of sugar. However, if the rates are to be graded at destination they favor breaking up the origin blanket into two groups. Defendants subscribe to a basis of rates from California to Arizona which is about 121 per cent of the rates for the same distances under the Memphis-Southwestern scale, provided that the rates to Arizona points are based upon the weighted-average haul.

As stated, the only California points at which cane sugar is refined are San Francisco and Crockett. The southern California distributors of beet sugar stock a limited amount of cane sugar in order to fill orders for mixed carloads containing certain

Exhibit No. 3, p. 6. [253]

varieties of sugar (177) not obtainable at beet-sugar refineries. The production of beet sugar in California during 1925 was as follows:

Producing point	Quantity	Producing point	Quantity
Dyer	9,095	Tracy	8,297
Los Alamitos	2,010	Alvarado	9,580
Oxnard	15,310		
Betteravia	18,559	Total	92,917
Spreckles	30,066		

The production at the southern California points of Dyer, Los Alamitos, and Oxnard was 28.43 per cent of the total production for the State during 1925. In addition there was a substantial movement of sugar by water to San Pedro, Calif.

During the past several years, due to blight, drought, and the use for other purposes of land formerly planted in beets, there has been a substantial diminution in the amount of beet sugar produced in southern California and, as a consequence, a reduction in the number of refineries. The following table, giving movements from California refineries on the Southern Pacific to destinations in Arizona and New Mexico and to El Paso, shows that there has been a substantial reduction, both in the volume of movement from southern California to the territory of destination described and in the ratio such tonnage bears to the tonnage from northern California:

		Northern California			Southern California	
	Cars	Tons	Per cent	Cars	Tons	Per cent
Year 1921	187	5,920	24	265	8,519	76
Year 1922	188	5,920	39.4	265	8,423	70.6
Year 1923	247	7,754	72.9	67	2,129	27.1
Year 1924	313	9,856	86	44	1,415	14
Year 1925	504	15,615	95.5	23	714	4.5

In addition to the above there were shipments of sugar from San Francisco over the Santa Fe to destinations on its own line west of Albuquerque. In 1925 they amounted to 107 cars, weighing 3,029 tons. This additional tonnage changes the percentages for 1925 to 96.3 per cent from northern California and 3.7 per cent from southern California. Of the total of 611 cars from northern California, 227 moved from San Francisco and 370 from Crockett. The weight of the shipments from these two points aggregated 18,490 tons. Only 14 cars moved from other northern California points, of which 11 moved from Spreckels and 3 from Betteravia.

We have upon this record no serious contention from producers, distributors, or consumers that a breaking up of the present extensive (178)

Exhibit No. 3, p. 7. [254]

origin and destination groupings would be detrimental to their interests. Bearing in mind the length of time during which the present California group has existed and the fact that until recent years the movement has been substantial from both northern and southern California, we do not find that group as such to have been or to be unreasonable; but in view of the fact that most of the movement now is from two of the most distant points of shipment, an origin group approximately 500 miles in length is no longer justified. A more reasonable adjustment for the future would seem to require the breaking up of the origin territory into two groups,

the northern group extending from San Francisco and Crockett on the north to Spreckels on the south, and the southern group extending from Betteravia on the north to Dyer on the south.

Since the hearings in these cases we have decided *Consolidated Southwestern Cases*, 123 I. C. C. 203, in which new distance scales of rates were prescribed for application on classes and commodities generally throughout the Southwest. The scale on sugar prescribed in those cases, hereinafter referred to as the southwestern scale, is 30 per cent of the first-class rates therein prescribed and will apply in connection with a minimum weight of 60,000 pounds. The following table shows the average short-line distances from the southern and northern groups to points or groups of destination and compares the rates proposed by certain of complainants with rates on basis of 120 per cent of the southwestern scale for like distances:

	From southern group			From northern group		
	Distance	Complainants' proposed rates	120% of southwestern rates	Distance	Complainants' proposed rates	120% of southwestern rates
	Miles	*Cents*	*Cents*	*Miles*	*Cents*	*Cents*
From Group 1 to Yuma, Ariz.	267	40	45.5	637	50	72
From Group 2 to Kingman, Ariz.	388	47	56.5	645	57	73
From Group 3 to Phoenix, Ariz.	467	55	61	749	65	79
From Group 4 to—						
Tucson, Ariz.	519			847		
Prescott, Ariz.	526			782		
Williams, Ariz.	527			783		
Flagstaff, Ariz.	561			818		
Clarkdale, Ariz.	563			820		
Group average	539	55	65	810	65	83
From Group 5 to—						
Winslow, Ariz.	619			876		
Bisbee, Ariz.	628			956		
Bowie, Ariz.	634			961		
Douglas Ariz.	643			971		
Holbrook, Ariz.	652			909		
Group average	635	59	72	935	69	89
From Group 6 to—						
Safford, Ariz.	674	60	74.5	1,001	70	92.5
From Group 7 to—						
Gallup, N. Mex.	747			1,004		
Clifton, Ariz.	753			1,081		
Globe, Ariz.	758			1,085		
Group average	752	64	79	1,057	74	95

Exhibit No. 3, p. 8. [255]

(179) No. 16670 (Sub-No. 7) brings in issue the reasonableness of the rates from Colorado and Kansas refineries to Gallup, and contains a prayer for reparation on shipments subsequent to March 31, 1923. Prior to June 25, 1918, the rate on sugar from transcontinental Group E, which includes New Orleans, to Pacific coast points was 85 cents, minimum 60,000 pounds, and this rate applied as maximum from Kansas and Colorado points. The general increases and reduction resulted in rates from Colorado and Kansas, respectively, to Arizona points on the Santa Fe of $1.195 and $1.28, the difference resulting from general increases of 25 and 33⅓ per cent, respectively, from Colorado and Kansas on August 26, 1920. At the time of the hearing the fifth-class rate of $1.145 was applicable on sugar from Colorado refineries to Gallup. At that time a commodity rate of 75 cents applied from Colorado points to Albuquerque, and on August 1, 1925, the present commodity rate of 84 cents, minimum 60,000 pounds, was established from the same points to Gallup. The present rate to Albuquerque is 76 cents, and the same rate applies from Denver and Pueblo, Colo., to El Paso. To Fort Worth, Tex., the rate is 72 cents, minimum 36,000 pounds.

The record fails to show any movement, actual or prospective, from Kansas, and the rates from that State will not be further considered.

The Colorado points of origin are shown by complainant at including Denver, Fort Collins, Greeley, Holly, Lamar, Longmont, Loveland, Las Animas, Lupton, Rocky Ford, Swink, and Windsor. The Santa Fe, which is the only carrier serving the

Colorado group named as defendant herein, carries rates to points on its line in Arizona and New Mexico only from Holly, Lamar, Las Animas, Rocky Ford, and Swink. The average distance from the group to Gallup is shown by complainants as 625 miles. Complainant in No. 16670 (Sub-No. 7) showed only seven shipments from Colorado to Gallup since March 31, 1923, six from Swink, and one from Rocky Ford.

The rates herein prescribed under section 1 will remove any undue prejudice which may exist in the rates assailed, and no findings with respect to the allegations under section 3 are necessary.

The evidence shows that all of the complainants, except the C. N. Cotton Company, made or received shipments of sugar as described, and paid and bore the charges thereon.

Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cent less than the rate prescribed as reasonable by us from and to the same points in *Phoenix Chamber of Commerce* (180) v. *Director General*, 140 I. C. C.

Exhibit No. 3, p. 9. [256]

supra, referred to as the first Phoenix case, and that the period of reparation in the former case extended back approximately four months prior to the date when the latter case was decided. Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have sev-

eral times announced that the doctrine of *res adjudicata* is not applied by us. *Goss* v. *Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

We find that the assailed rate, minimum 60,000 pounds, from Holly and other Santa Fe points in Colorado grouped therewith to Gallup was, is, and will be unreasonable to the extent that it exceeded, exceeds, or may exceed 72 cents. We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed,

or may exceed, respectively, the following, in cents per 100 pounds:

Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; on and between July 1, 1922, and the effective date of the rates herein prescribed for the future, from the southern California group and the northern California, group, respectively, 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, 73 and 77 cents to Prescott, Williams, Tucson, Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe; and for the future as follows:

140 I. C. C.

Exhibit No. 3, p. 10. [257]

(181)

To—	From southern California group	From northern California group	To—	From southern California group	From northern California group
	Cents	*Cents*		*Cents*	*Cents*
Yuma, Ariz.	46	66	Bisbee, Ariz.	72	84
Kingman, Ariz.	57	69	Bowie, Ariz.	72	84
Phoenix, Ariz.	61	73	Douglas, Ariz.	72	84
Tucson, Ariz.	65	77	Holbrook, Ariz.	72	84
Prescott, Ariz.	65	77	Safford, Ariz.	75	87
Williams, Ariz.	65	77	Gallup, N. Mex	79	89
Flagstaff, Ariz.	65	77	Clifton, Ariz.	79	89
Clarkdale, Ariz.	65	77	Globe, Ariz.	79	89
Winslow, Ariz.	72	84			

We further find that complainants, except the C. N. Cotton Company, made shipments as described at the rates herein found to have been unreasonable; that they paid and bore the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice. No reparation orders have been issued in Nos. 14449 and 14140, and complainants in those cases should submit to the carriers new statements in compliance with Rule V referred to.

Our original order in No. 14449 and the order of division 3 in No. 14140 will be modified in conformity with the foregoing conclusions, and appropriate orders for the future will be entered in other cases disposed of in this report.

TAYLOR, *Commissioner,* concurring in part:

I dissent from so much of this report as finds the rates unreasonable in the past and awards reparation.

Commissioner PORTER did not participate in the disposition of this case.

140 I. C. C.

Exhibit No. 3, p. 11. [258]

ORDERS

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1928

No. 16770

Bashford-Burmister Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 1)

Central Commercial Company

v.

Same

No. 16770 (Sub-No. 2)

Wheeler Perry Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

No. 16770 (Sub-No. 3)

T. F. Miller Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Elctric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

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No. 16770 (Sub-No. 4)

E. F. Sanguinetti

v.

Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

(1)

Exhibit No. 3, p. 12. [259]

No. 16770 (Sub-No. 5)

Arizona Grocery. Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

No. 16770 (Sub-No. 6)

Arizona Wholesale Grocery Company

v.

Arizona Eastern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 7)

C. N. Cotton Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Rio Grande, El Paso and Santa Fe Railroad Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 16770 (Sub-No. 8)

Babbitt Brothers Trading Company; Arizona Stores Company; Babbitt Brothers Company; and Babbitt Brothers

v.

Same

No. 16770 (Sub-No. 9)

Wm. H. Dagg Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Bay Transport Company

---

No. 17549

Phelps, Dodge Mercantile Company

v.

The Atchison, Topeka & Santa Fe Railway Company; El Paso & Southwestern Railroad Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

(II)

Exhibit No. 3, p. 13. [260]

No. 17549 (Sub-No. 1)

Baffert & Leon

v.

The Atchison, Topeka & Santa Fe Railway Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Southern Pacific Company

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No. 17466

United Verde Extension Mining Company

v.

Same

No. 17781

Simpson-Ashby Company

v.

Southern Pacific Company

These cases being at issue upon complaints, as amended, and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to points in Arizona, referred to in the next succeeding paragraph hereof, and to Gallup, N. Mex., and from points in Colorado, referred to in the second succeeding paragraph hereof, to Gallup, which shall exceed the rates hereinafter prescribed.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner

prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from the following California groups, as defined in the report made a part hereof, to the Arizona and New Mexico destinations named below, rates, minimum weight 60,000 pounds, which shall not exceed the following, in cents per 100 pounds:

(III)

Exhibit No. 3, p. 14. [261]

To—	From southern California group	From northern California group	To—	From southern California group	From northern California group
	Cents	*Cents*		*Cents*	*Cents*
Yuma, Ariz.	46	66	Bisbee, Ariz.	72	84
Kingman, Ariz.	57	69	Bowie, Ariz.	72	84
Phoenix, Ariz.	61	73	Douglas, Ariz.	72	84
Tucson, Ariz.	65	77	Holbrook, Ariz.	72	84
Prescott, Ariz.	65	77	Safford, Ariz.	75	87
Williams, Ariz.	65	77	Gallup, N. Mex.	79	89
Flagstaff, Ariz.	65	77	Clifton, Ariz.	79	89
Clarkdale, Ariz.	65	77	Globe, Ariz.	79	89
Winslow, Ariz.	72	84			

It is further ordered, That said defendants in No. 16670 (Sub-No. 7), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, from Holly, Lamar, Rocky Ford, and Swink, Colo., and other points on the Atchison, Topeka & Santa Fe Railway in Colorado taking the same rates, to Gallup, N. Mex., a rate which shall not exceed 72 cents per 100 pounds, minimum weight 60,000 pounds.

And it is further ordered, That these orders shall continue in force until the further order of the commission.

SUPPLEMENTAL ORDERS

No. 1449

Traffic Bureau of the Phoenix Chamber of Commerce; Haas-Baruch & Company; Hall-Pollock Company; The Melczer Company; and James A. Dick Company

v.

The Atchison, Topeka & Santa Fe Railway Company; Southern Pacific Company; Pacific Electric Railway Company; Santa Maria Valley Railroad Company; and Arizona Eastern Railroad Company

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No. 14140

Solomon-Wickersham Company

v.

Santa Maria Valley Railroad Company and Southern Pacific Company

These cases having been reopened for oral argument jointly with No. 16742, *Traffic Bureau of the Phoenix Chamber of Commerce et al.* v. *A. T. & S. F. Ry. Co. et al.*, and cases consolidated therewith, and such oral argument having been had, and

the commission having, on the date hereof, made and filed a new report containing its findings of fact

(IV)

Exhibit No. 3, p. 15. [262]

and conclusions thereon, which said report, together with the previous reports herein, 95 I. C. C. 244 and 101 I. C. C. 667, are hereby referred to and made a part hereof:

It is ordered, That the order entered in No. 14449 on January 6, 1925, and the order entered in No. 14140 on July 17, 1925, be, and they are hereby, modified so that the second and third paragraphs thereof will read, respectively, as follows:

It is ordered, That the above-named defendants in No. 14449, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding or collecting rates for the transportation of sugar, in carloads, from points in California to Phoenix, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates

to Phoenix, Ariz., minimum weight 60,000 pounds, which shall not exceed 61 cents per 100 pounds from points in southern California group, as defined in the report of this date made a part hereof, and 73 cents per 100 pounds from points in the northern California group, as defined in the said report.

It is ordered, That the above-named defendants in No. 14140, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 11, 1928, and thereafter to abstain, from publishing, demanding, or collecting rates for the transportation of sugar, in carloads, from points in California to Bowie, Ariz., which shall exceed the rates prescribed in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 11, 1928, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of sugar, in carloads, rates to Bowie, Ariz., minimum weight 60,000 pounds, which shall not exceed 72 cents per 100 pounds from the southern California Group, as defined in the report of this date made a part hereof, and 84 cents per 100 pounds from the northern California group, as defined in the said report.

And it is further ordered, That these supplemental orders shall continue in force until the further order of the commission.

By the commission.

[Seal] GEORGE B. McGINTY,
Secretary.

(V)

U. S. Government Printing Office: 1928

Exhibit No. 3, p. 16. [263]

Counsel for both parties thereupon filed a written stipulation signed by all of said counsel agreeing upon procedure to be followed and agreeing to submit the causes upon the records with certain exceptions; said stipulation reading as follows:

(Title of Court and Cause—Nos. L.-695 and L.-696—Phoenix.)

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled actions, and by and between their respective attorneys and counsel that:

1. The foregoing actions shall be submitted to the trial court for decision upon the record in said actions, as made by the filing of the agreed statement of facts executed by the parties under date of January 8, 1930, and by the introduction in evidence of the order of the Interstate Commerce Commission in I. C. C. Docket No. 16,742, under date of March 11, 1929 (a copy of said order being annexed to each of the complaints herein and marked Exhibit "C"), and upon argument of counsel upon the record so made.

2. In the event that said court shall decide that upon the record as so made, judgments in said causes should be entered in favor of the defendants, plaintiff shall have the right, within ten days after notice of such decision, to serve and file a motion for a further hearing of said causes, for the purpose of offering testimony on behalf of plaintiff respecting the reasonableness, at the times of their assessment, of the rates assessed and collected upon plaintiff's shipments referred to in detail upon the statements annexed to the complaints in said causes and marked Exhibit "A."

3. Defendants will not oppose such motion for further hearing, but shall have the right to make objection to any and all of such further testimony upon any and all grounds which may seem proper to them. [264]

4. In the event that the court shall decide, upon the record as made, that judgments should be entered for the plaintiffs in said causes, either party shall have the right upon ten days' notice, and as soon thereafter as the issue may be heard, to introduce testimony respecting the amount of the attorneys' fees to be allowed by the Court to plaintiffs' attorneys and counsel.

ELLIOTT & SNELL,
Attorneys for Plaintiff.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

The defendants had theretofore filed written requests for special findings of fact by the Court.

Thereupon, pursuant to said stipulations plaintiff did offer a copy of an order of the Interstate Commerce Commission dated March 11, 1929, which without objection was admitted in evidence as Plaintiff's Exhibit "A"; and plaintiff introduced two instruments showing shipments and amount of reparations claimed by it, which without objection were admitted in evidence as Plaintiff's Exhibits "B" and "C" respectively. Plaintiff and defendants introduced no further evidence on that day. Plaintiff's Exhibits "A," "B" and "C," so introduced in evidence are as follows: [265]

PLAINTIFF'S EXHIBIT "A."

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, Held at its office in Washington, D. C., on the 11th day of March, A. D. 1929.

No. 16742.

Traffic Bureau of Phoenix Chamber of Commerce, et al.,

vs.

The Atchison, Topeka & Santa Fe Railway Company, et al.

It appearing, That on March 12, 1928, the commission entered its report in the above entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of

reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainant is entitled to awards of reparation from the defendants named in the following table, in the amounts set opposite their respective names, with interest.

Defendants	Amounts
The Atchison, Topeka & Santa Fe Railway Company	$2,203.55
Bay Transport Company, and The Atchison, Topeka & Santa Fe Railway Company	1,251.02
Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company	297.04
Southern Pacific Company	2,104.58
Santa Maria Valley Railroad Company, and Southern Pacific Company	359.75

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they are hereby, authorized and directed to pay unto the complainant, Arizona Grocery Company, on or before April 26, 1929, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of sugar, from California points

to destinations in Arizona and from California and Colorado points to Gallup, N. Mex.

By the commission.

(Seal) GEORGE B. McGINTY,
Secretary.

[Endorsed]: Pltfs. Exhibit *No.* "A" Admitted and Filed January 8, 1930. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Case No. L.-695—Phx. and L.-696-Phx. Arizona Grocery Co. vs. So. Pac. Co. et al. [266]

PLAINTIFF'S EXHIBIT "B."

CLAIM No. 805-1

Claim No. 805-1 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Sugar Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1923.	1923.									
2-22	3- 1	CM&StP	87286	Crockett	60789	86½	525.82	73	443.76	82.06
3-13	3- 2	GH&SA	50987	San Fran.	60896	86½	526.75	73	444.54	82.21
3-20	3-28	SP	87745	"	60813	86½	526.03	73	443.93	82.10
4-25	5- 2	SP	35005	"	60788	86½	525.82	73	443.75	82.07
5-12	5-19	SP	27309	"	60838	86½	526.25	73	444.12	82.13
6-27	7-10	SP	16940	"	81023	86½	700.85	73	591.47	109.38
9-14	9-20	SP	26505	Oxnard	60450	86½	522.89	71	429.20	93.69
9-19	9-26	SP	35048	San Fran.	60838	86½	526.25	73	444.12	82.13
10-11	10-18	SP	21533	Oxnard	60450	86½	522.89	71	429.20	93.69

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1924.	1924.									
2- 5	2-12	CGW	29228	Oxnard	60450	84	507.78	71	429.20	78.58
3-22	3-28	SP	16776	San Fran.	60750	84	510.30	73	443.48	66.82
3-29	4- 9	SP	29047	"	60782	84	510.67	73	443.71	66.86
4-11	4-17	NYC	248647	"	60940	84	511.90	73	444.86	67.04
6-14	6-20	NYC	51840	Crockett	60651	84	509.47	73	442.75	66.72
6-24	7- 2	SP	28501	San Fran.	60964	84	512.10	73	445.04	67.06
6-25	7- 2	SP	81424	Crockett	60678	84	509.70	73	442.95	66.75
8-16	8-25	Sou.	135043	"	60657	84	509.52	73	442.80	66.72
8-28	9- 2	SP	16630	"	60733	84	510.16	73	443.35	66.81
9-18	9-24	SP	81461	"	60690	84	509.80	73	443.04	66.76
9-25	10- 1	LW	32523	"	60677	84	509.69	73	442.94	66.75
11- 5	11-14	MKT	68173	San Fran.	61253	84	514.53	73	447.15	67.38
11-13	11-18	SP	30000	Crockett	60679	84	509.70	73	442.96	66.74
12- 1	12- 8	SP	28487	"	60640	84	509.38	73	442.67	66.71

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Railway						
1924.	1924.									
12- 3	12- 9	SP	30791	San Fran.	60669	84	509.62	73	442.88	66.74
12-15	12-22	SP	21267	Crockett	90707	84	761.94	73	662.16	99.78
1925.	1925.									
1- 7	1-13	SP	29825	San Fran.	60983	84	512.25	73	445.18	67.07
1-14	1-19	SP	27862	"	60890	84	511.48	73	444.50	66.98
1-29	2- 4	SSW	27113	Crockett	60676	84	509.68	73	442.93	66.75
1923.	1923.			**Routed via S. M. V. R. R. Co.—S. P. Co.**						
9-16	9-20	SP	16564	Betteravia	60450	86½	522.89	71	429.20	93.69
9-28	10- 5	LW	32484	"	60450	86½	522.89	71	429.20	93.69
10- 9	10-16	SP	87173	"	60450	86½	522.99	71	429.20	93.79
1924.	1924.									
6-16	6-23	GH	50670	"	60450	84	507.78	71	429.20	78.58
						Totals	$16,929.67		$14,465.44	$2464.23

With Accrued Interest.

ARIZONA GROCERY COMPANY, Claimant.

By ROLAND JOHNSTON, Attorney,
Room 14—Arizona Fire Building,
Phoenix, Arizona, April 16, 1928.

[Endorsed]: Pltf's Exhibit *No.* "B." Admitted and Filed January 8, 1930. C. R. McFall, Clerk. By J. Lee Baker. Chief Deputy Clerk. Case No. L.-695—Phx. and L.-696—Phx. Arizona Gro. Co. vs. So. Pac. Co. et al. [268]

PLAINTIFF'S EXHIBIT "C."

CLAIM No. 806-2.

Claim No. 806-2 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Sugar Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via A. T. & S. F. Ry. Co.						
1923.	1923.									
2-24	2-26	AT	26966	San FR.	60450	86½	522.89	73	441.29	81.60
7-25	7-31	AT	36212	"	61152	86½	528.96	73	446.41	82.55
8-30	9- 6	AT	116775	"	60758	86½	525.56	73	443.53	82.03
10- 4	10- 9	AT	34714	"	60819	86½	526.08	73	443.98	82.10
11-16	11-21	AT	43738	"	61093	86½	528.45	73	445.98	82.47
11-23	11-30	AT	63696	"	68450	86½	592.09	73	499.69	92.40
12- 1	12- 7	AT	116509	"	61115	86½	528.84	73	446.14	82.50

Shipt.	Collection	Init.	No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Separation
				Routed via A. T. & S. F. Ry. Co.						
1924.	1924.									
1- 2	1- 7	AT	116055	San Fr.	60725	86½	525.27	73	443.29	81.98
1-11	1-17	AT	118045	"	61316	84	515.05	73	447.61	67.44
1-16	1-21	AT	39566	"	83955	84	705.22	73	612.87	92.35
1-18	1-24	AT	46224	"	60619	84	509.20	73	442.52	66.68
1-25	1-30	AT	27562	"	60715	84	510.01	73	443.22	66.79
2- 4	2- 8	AT	32233	"	60770	84	510.47	73	443.62	66.85
2-20	2-26	AT	116304	"	60832	84	510.99	73	444.07	66.92
3-20	3-24	AT	118181	"	61224	84	514.28	73	446.94	67.34
5-17	5-22	AT	116599	"	61009	84	512.48	73	445.37	67.11
6- 3	6- 9	AT	117726	"	61195	84	514.08	73	446.72	67.36
7- 7	7-14	AT	116356	"	60732	84	510.15	73	443.34	66.81
7-29	8- 4	AT	46535	"	61065	84	512.95	73	445.77	67.18
8-23	8-28	AT	38975	"	60959	84	512.06	73	445.00	67.06
9- 4	9- 9	AT	35968	"	60770	84	510.47	73	443.62	66.85
9-24	9-29	AT	117847	"	60915	84	511.69	73	444.68	67.01
1923.	1923.									
2- 6	2-13	AT	33480	"	60625	86½	524.41	73	442.56	81.85

us. Arizona Grocery Co.

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via A. T. & S. F. Ry. Co.						
1924.	1924.									
9–27	10– 3	AT	116476	San Fran.	60713	84	509.99	73	443.20	66.79
11–21	11–28	AT	65098	"	60871	84	511.32	73	444.36	66.96
12–27	12–31	AT	63603	"	60812	84	510.82	73	443.93	66.89
	1925.									
12–29	1– 3	AT	130017	"	80905	84	679.60	73	590.61	88.99
1925.	1925.									
1–22	1–25	AT	36086	"	61222	84	514.26	73	446.92	67.34
1–30	2– 4	AT	65112	"	60512	84	508.30	73	441.74	66.56
2– 3	2– 6	AT	43806	"	60700	84	509.88	73	443.11	66.77
2– 5	2–10	AT	47163	"	60737	84	510.19	73	443.38	66.81
1923.	1923.				Routed via B. T. Co., San Francisco AT. SF. Ry. Co.					
2–16	2–23	NYC	246308	Crockett	60456	86½	522.90	73	441.33	81.57
2–28	3– 6	AT	26875	"	60450	86½	522.90	73	441.29	81.61
5– 9	5–15	AT	27269	"	60450	86½	522.90	73	441.29	81.61
6– 1	6– 7	AT	32244	"	61138	86½	528.84	73	446.31	82.53
6–14	6–19	AT	34050	"	60751	86½	525.50	73	443.48	82.02
7–31	8– 7	AT	27200	"	60717	86½	525.21	73	443.23	81.98

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via B. T. Co., San Francisco A. T. S. Ry. Co.						
1923.	1923.									
8- 9	8-15	AT	49701	Crockett	60717	86½	525.21	73	443.23	81.98
8-22	8-29	AT	48544	"	83093	86½	718.75	73	606.58	112.17
9-28	10- 4	AT	38360	"	60690	86½	524.79	73	443.04	81.93
12-14	12-19	NOTM	2480	"	60781	86½	525.75	73	443.70	82.05
1924.	1924.									
2-20	2-26	AT	33637	"	60882	84	511.41	73	444.44	66.97
3- 3	3- 7	AT	33848	"	60986	84	512.29	73	445.20	67.09
5- 1	5- 6	AT	35949	"	60966	84	512.12	73	445.05	67.07
6-28	7- 2	AT	63056	"	60690	84	509.80	73	443.04	66.76
8-14	8-19	AT	31198	"	60809	84	510.80	73	443.91	66.89

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via S. P. Bay Point A. T. & S. F. Ry. Co.						
1923. 4–30	1923. 5– 7	SP	35299	Crockett	60737	86½	525.38	73	443.38	82.00
12–29	1924. 1– 4	DIW	38646	"	60723	86½	525.25	73	443.28	81.97
1924. 2– 3	1924. 2–11	SSW	25848	"	60692	84	509.81	73	443.05	66.76
				Routed via S. P. Los Angeles, A. T. & S. F. Ry.						
2–20	2–28	CM&StP	92364	Spreckles	60450	84	507.78	73	441.29	66.49
						Totals.....	$26483.38		$22731.59	$3751.79

With Accrued Interest.

THE ARIZONA GROCERY COMPANY, Claimants.

By ROLAND JOHNSON, Attorney,

Room 14, Arizona Fire Building, Phoenix, Arizona, April 16, 1928.

[Endorsed]: Pltf.'s Exhibit *No.* "C." Admitted and Filed January 8, 1930. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Case No. L.-695—Phx. and L.-696—Phx. Arizona Gro. Co. vs. So. Pac. Co. et al.

Pursuant to stipulations and upon the agreed statement of facts, counsel for each of the parties orally argued their respective points and the Court took the causes under advisement, and thereafter each of the parties filed briefs with the court, and thereafter, to wit, on the 19th day of May, 1930, the Court rendered and entered an order overruling defendants' demurrers in said causes, to which order and ruling the said defendants did then and there in open court duly except; and the Court announced that he was of the opinion that after the final submission of the causes plaintiff would be entitled to recover.

Thereafter, and on the 23d day of June, 1930, and pursuant to stipulation and agreement of the parties to the actions, each of the said parties introduced testimony respecting the amount of attorney's fees to be allowed by the Court to plaintiff's attorneys, and to support its contentions as to attorneys' fees the plaintiff offered the following testimony, to wit:

TESTIMONY OF FRANK L. SNELL, FOR PLAINTIFF.

My name is Frank L. Snell, Junior, and I am a member of the firm of Elliott & Snell, attorneys for the plaintiff in the two cases numbered L.–695 and L.–696. I believe, as an attorney, and being familiar with all of the facts, the attorneys' fees in the total amount of $2,500.00 for both cases, which has been asked for, is reasonable. The total amount involved in the two cases is approximately $9,000.00.

(Testimony of Frank L. Snell.)

Cross-examination.

The total amount of the principal involved in case L.–695—Phoenix is $3,751.61, without interest. The interest on that amount up to July 31, 1929, is $1,237.80, and since said last-mentioned date interest has accumulated [272] to the extent of about $250.00 and according to my calculation the total amount of principal and interest due up to this present date in case L.–695—Phoenix is $5,239.41. In case No. L.–696—Phoenix, the principal amount is $2,464.33, and interest on said amount to the 31st day of July, 1929, is $798.38, and since said last-mentioned date approximately $125.00 additional interest has accrued up to this date, making approximately $3,387.61 principal and interest due in case L.–696—Phoenix, and approximately a total amount of $8,627.02 principal and interest due in the two cases. The attorneys' fees asked by us in the complaints amount to about 29% of the total amount involved. The form of the complaints in the two cases is identical, except for the exhibits and the items of the shipments involved. I did not get the form of the complaint out of the statute. I should say that these complaints are considerably different from a suit on a promissory note. We were not required to try the cases in court on facts as there was an agreed statement. The agreed statement was first submitted by attorneys for defendants and we examined the same and submitted additions, corrections, and amendments. The attorneys' fees which we ask in our complaints is not in contemplation of an appeal that may be taken.

(Testimony of Samuel White.)

To-day is my second formal appearance in court in reference to these cases, but I have been over here at other times relative to getting motions assigned for hearing. The majority of my time on these cases was not spent in court, but on briefs and other preparations. This is the first case of this kind our firm of attorneys has tried in a court.

TESTIMONY OF SAMUEL WHITE, FOR PLAINTIFF.

My name is Samuel White and I am an attorney of this court, and have been interested in several reparation [273] cases. I am more or less familiar with these cases No. L.-695—Phoenix and L.-696—Phoenix, and have examined the pleadings, briefs, and other documents pertaining to the same and have discussed the matter many times with counsel for the plaintiff. I think I am familiar enough with the cases to qualify to testify as to the reasonableness of attorneys' fees. Considering the amount of work that is necessary in cases of this kind and the preparation of briefs and the work that I know counsel has put in on this case I consider the sum of $2,500.00 a reasonable attorneys' fee for the two cases.

Cross-examination.

To some extent I have collaborated with Mr. Snell in the preparation of these cases and gave him the benefit of experiences I had in prior cases of a like nature, in which I have been interested.

Thereupon plaintiff rested.

TESTIMONY OF SAMUEL WHITE, FOR PLAINTIFF (RECALLED).

Mr. WHITE was recalled by the Court and upon questions by the Court testified as follows: About two years ago I had two cases similar to the present one in which something like $24,000.00 was involved and your Honor allowed me $5,000.00 attorneys' fees for the two cases which was a little less than 20% of the amount involved. In those cases the amount involved was not taken into consideration so much as the work that was necessary in the preparation and the handling of the case; and those cases were of the same kind and character as the present one. In arriving at attorneys' fees the Court should consider the amount involved, but in my opinion, that should not be the only basis of arriving at attorney' fees.

Upon questions by Mr. WHITNEY, one of the attorneys for the defendants, Mr. WHITE testified: I have handled a few mortgage foreclosures in my time and for a man who is familiar with the preparing of complaints of such character [274] as in L.-695 and L.-696 it would not require any more skill to prepare the complaint than it would to properly foreclose a mortgage, but the preparation of the complaint is not all there is to these cases by any means. Sometimes in mortgage foreclosures the preparation of the complaint is not all the work involved. Ten per cent (10%) is usually the sum provided in the mortgage contract for attorney's

(Testimony of A. B. Mason.)

fees in the event of foreclosure where the amount of the mortgage is $10,000.00 and upwards.

Upon a question by Mr. SNELL, attorney for plaintiff, Mr. WHITE testified: In my experience I have not found that the foreclosure of mortgages requires anything like as much labor, effort and skill as the present cases.

The defendants upon their part offered the following testimony, to wit:

TESTIMONY OF A. B. MASON, FOR DEFENDANTS.

My name is A. Burton Mason. I reside at San Francisco, and am a practicing attorney of the State of California, and of the United States District Courts therein, and of the Circuit Court of Appeals for the Ninth Circuit, and am also a registered practitioner before the Interstate Commerce Commission and before the Board of Tax Appeals. I am one of the attorneys for defendant in these cases. I have been admitted to the bar since 1921 and have been a member of the legal staff of the Southern Pacific Company for a little more than four years with the title of "Commerce Attorney." Prior to that time I was associated for approximately five years with the firm of McCutchen, Olney, Mannon & Greene, a legal firm in San Francisco, practising in many fields of law, including to a large extent prosecution of cases before the Interstate [275] Commerce Commission and before the State and Federal Courts arising out of the In-

(Testimony of A. B. Mason.)

terstate Commerce Act and related statutes. While I was in that office my time was most particularly devoted to Interstate Commerce matters. I have been counsel on both sides—for both shippers and carriers—in several actions of the same character as these present cases, and I am familiar with the fees had and allowed in such cases and also with the proceedings taken in the same. From my experience in these cases I would say that the professional service required of plaintiff's attorneys included the preparation of two simple complaints, substantially identical in form, except as to figures and the exhibits; and such complaints are no more difficult to prepare than the ordinary form of complaint on a promissory note. As to the exhibits listing the shipments, those were prepared long before the cases were brought, being the ordinary Rule V statements to the Interstate Commerce Commission. I do not believe that any extended investigation was required preliminary to the preparation of the complaints. Following the filing and service of these complaints plaintiff's attorneys conferred briefly with our local attorneys respecting further proceedings, but as far as I know prior to the former hearing of the case they were not required to prepare any other papers or documents. Answers and demurrers were prepared and filed by attorneys for defendants, who also offered to submit the cases upon an agreed statement of facts, and prepared a draft of such statement of facts which was submitted to plaintiff's attorneys. Plaintiff's attorneys examined that brief and sug-

(Testimony of A. B. Mason.)

gested minor corrections; and a conference was had with Mr. Snell at which the agreed statement of facts was finally drawn up and agreed upon. I prepared the defendants' brief, and carefully read the brief submitted by plaintiff. [276]

If I was called upon to render an opinion concerning income tax, involving the examination of law equal to that in preparing the briefs filed in this case, I would gauge my services according to amount involved. I recently successfully prosecuted a proceedings before the Treasury Department and Board of Tax Appeals, involving income taxes amounting to the principal sum of approximately $5,250.00, which required an investigation of law which I imagine is tantamount to that required of Mr. Snell in this case. I have not had a great deal of experience before the Board of Tax Appeals—possibly my experience is equal to Mr. Snell's before the Interstate Commerce Commission, or before this court in Interstate Commerce cases. The fee which I assessed and expect to be paid by my clients is $800.00. The proceeding required a trip on my part from San Francisco to Washington, and two trips from San Francisco to New York City. My fee does not include my expenses and the same are to be added. I think that 20% of the amount involved is a grossly excessive attorneys' fee in cases of this kind, and I think 10% is adequate and 15% extortionate. Outside of the preparation of briefs and the argument counsel was required to do practically nothing, and it must be admitted that plaintiff's counsel had the

(Testimony of A. B. Mason.)

benefit of the briefs prepared in the Gillespie cases, which had theretofore been handled by Mr. Samuel White. I read the brief in the Gillespie cases and plaintiff's brief in this case, and they read together pretty well. Plaintiff's counsel admit that he collaborated with Mr. White. Plaintiff's counsel states that he had to make an extended investigation of the law because this was his first experience in this field of the law, but I do not believe that defendant should be called upon to pay for education of plaintiff's counsel. In the Gillespie cases, [277] which were handled by Mr. Samuel White, and involved reparations similar to these cases: in one of such cases there was a judgment for $7,269.71 and a fee of $1500.00 was allowed, and in the second of such cases judgment was rendered for $19,062, and a fee of $3,500.00 was allowed. The Gillespie cases were really cases of first impression, as distinguished from the instant cases. Mr. Snell has been required actually to make only two court appearances in these cases, and I think that the ordinary fee for a court appearance is $100.00 a day where the attorney is not required to leave the city in which he resides; and I think that under the circumstances of these present cases, 10% of the amount involved or the sum of $850.00 would certainly be adequate compensation for counsel for the plaintiff. I may say that in my experience in California as an associate with counsel for shippers who are interested in similar cases, that in one case that I definitely recall, the amount involved was approximately $10,500, and the attorneys' fee asked

(Testimony of A. B. Mason.)

and allowed was $1,000.00. That case involved approximately the same character of labor as involved in the present cases. Our firm of attorneys with which I was associated always pride ourselves on the fact we had no real competition. In bringing an action of this kind the facts upon which the complaint is based are all set forth in a formal order issued by the Interstate Commerce Commission, except the necessary corporate identities of the plaintiff and defendants, and the assertion that the shipments were made. The fundamental facts are set forth in the Commission's supplemental order, which was introduced in evidence by the plaintiff in this case as Exhibit "A," and is an order dated March 11, 1929, which declares certain sums to be due. To each complaint is annexed Exhibit "A," which is nothing more than a transcript of a statement sent to the [278] Interstate Commerce Commission following its decision, and upon which its order for the payment of reparation is based. It is what is known as a Rule V statement. These statements are made up by the shipper himself. Counsel probably had nothing to do with the preparation of same. In this case I am certain the statements were made up by Mr. Johnston, and he gets the information from the shipper's freight bills, and from the decision of the Commission. It would be wholly unnecessary for counsel to prepare these exhibits.

Cross-examination.

I am familiar with the brief filed by attorneys for defendants. The following is a correct state-

(Testimony of A. B. Mason.)

ment made in the brief of the defendants filed in these cases:

> "The issues presented to the court in these cases are of major importance, not only to the parties immediately before the court, but to all shippers and carriers generally. While the sum at stake here is relatively inconsiderable, the principles involved are of commanding importance. The Commission's jurisdiction under the Act, and the constitutionality of the Statute, as construed by the Commission for the purpose of the order upon which these suits are based, present issues in which every common carrier engaged in interstate commerce, and every person who makes use of the carriers' facilities, is vitally interested."

Any statements made in the brief are over my signature and I take them to be true. The principles involved in these cases are of commanding importance; and as to question of the Commission's jurisdiction, certainly the carriers engaged in Interstate Commerce are vitally interested, and I suppose every person who makes use of the carriers' facilities is vitally interested, although the sum at stake is relatively inconsiderable. The same point is involved in this case as was involved in Docket 19516 before the Interstate Commerce Commission, in which I prepared a petition for rehearing, which is largely reproduced in my brief in this case; and plaintiff's opening brief in this case is to a [279] great extent a copy of the able brief

(Testimony of A. B. Mason.)

prepared by Mr. Samuel White in the Gillespie cases, involving a like point. This case presents one phase which is slightly different from that presented in the Gillespie cases, but as to the major issues, which are the Commission's power to award reparations against its own rates, and the constitutionality of the act in case that power is given by it, the issues here are precisely the same as in the Gillespie cases in which I was associated. I put in a great deal more labor on the instant case than I did on the Gillespie cases, for the reason that other counsel did the preliminary briefing in the Gillespie cases. [280]

TESTIMONY OF THOMAS G. NAIRN, FOR DEFENDANTS.

My name is Thomas G. Nairn; I am an attorney of the State of Arizona and of this court and have been practicing in Arizona for about fifteen years, and am of counsel for the Santa Fe in this case. I am familiar with the work which has been done in this case, and I have heard the testimony of Mr. Mason who just preceded me. I agree with his statement of the facts of labor performed. Based upon my experience as an attorney before this court, and in cases which I have represented the Santa Fe, and taking into account my experience and the amount involved, and all other relevant facts which are within my knowledge, I consider 10% of the amount re-

(Testimony of Thomas G. Nairn.)

covered to be an exceedingly reasonable attorneys' fee in these cases.

Cross-examination.

In determining the amount of fees in these cases, I take into consideration the amount involved and the time which should be spent on the case, also the necessity for quick action. I am reasonably familiar with this character of case. These cases are handled by the head officers of the respective railroads, and we are merely associated as counsel and we do not take the laboring oar, but I am reasonably familiar with them. I was all through this case from the beginning with Mr. Snell and I was in the conference as to stipulation as to facts. I think Mr. Snell and I have probably had more to do with one another about these cases, than any of the other attorneys.

(Mr. Gerald E. Duffy, an attorney of San Francisco, California, and Mr. L. B. Whitney, attorney of Phoenix, Arizona, were both present in court; and in order to save time, counsel for both parties then and there stipulated in open court that Mr. Duffy is Commerce Attorney of the Santa Fe, at San Francisco, [281] California, and Mr. Whitney is one of the attorneys for Southern Pacific Company, at Phoenix, Arizona, and that if said gentlemen were called as witnesses to testify, they would show that they had sufficient qualification to enable them to testify, and that they would testify substantially along the same lines as Mr. Nairn.)

Defendants rested and the testimony was closed. And thereupon the Court stated that he had read

the briefs filed in the cases and that they are very voluminous and show a great deal of research, and that 10% would be wholly inadequate and that he considered 20% of the amount involved to be a reasonable attorneys' fee for the amount of labor involved, and did then and there render and enter an order allowing plaintiff's attorney 20% of the principal and interest in each case, or a total of $1,725.40 in the two cases as attorneys' fees, when and if judgments are rendered for plaintiff. To the Court's said order, ruling, and finding, the defendants then and there in open court duly excepted. Thereupon the Court ordered special findings to be proposed, and withheld judgment until the settlement of such findings.

Thereafter the plaintiff did file written request for special findings of fact and conclusions of law by the Court; and the defendants did file written objections and exceptions to such findings of fact and conclusions of law requested by the plaintiff; and the defendants did file written special findings of fact and conclusions of law requested by them.

Thereafter, to wit, on the 11th day of July, 1930, the Court did, in open court, hear such proposed findings and exceptions thereto and defendants did then and there by their counsel request the Court by written instrument, and also orally in open court, to find the following facts and conclusions of law, to wit: (Paragraphs are numbered according to the written special findings of fact and [282] conclusions of law requested by defendants and on file in the causes.)

6. On the 22d day of June, 1921, in a proceeding before the Interstate Commerce Commission known as Docket 11532, entitled "Traffic Bureau, Phoenix, Chamber of Commerce, et al., complainants, v. Director General, et al., defendants" (to which proceeding Arizona Grocery Company, a co-partnership, predecessor in interest of the plaintiff herein, was a party complainant) upon a complaint alleging that the rates on sugar in carloads from points in California (including all points in said State referred to in said list of shipments hereinbefore set forth) to Phoenix had been, were, and in the future would be unreasonable in violation of the Interstate Commerce Act, said Commission after due hearing and investigation duly made and rendered its opinion and order in said proceeding dated June 22d, 1921, which said opinion is reported in Volume 62, I. C. C. Reports, at pages 412 and following. Said report and order were and are as follows:

(Same as Exhibit No. 1 annexed to agreed statement of facts, and reference is hereby made to said Exhibit.)

Thereafter the defendants in said proceeding before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly filed and published their tariffs effective September 17, 1921, complying with the Commission's order in said Docket No. 11532, and naming a rate of 96 cents per hundred pounds on sugar, in carloads, from

points in California to Phoenix, Arizona, which said rate was one-half cent less than the rate of 96½ cents per hundred pounds found not unreasonable for the future by said Commission in said Docket No. 11532.

Said rate of 96 cents per 100 pounds remained in effect until on or about July 1, 1922, upon which date, in accordance with the recommendations made by said Commission in a report in a proceeding known as Docket No. 13293, Reduced Rates, 1922 reported in Volume 68, I. C. C. Reports, at pages 676 and following, said rate of 96 cents was voluntarily reduced to 86½ cents per hundred pounds; said last-mentioned rate of 86½ cents per hundred pounds was named in tariffs of said defendants herein, and of other carriers engaged in Interstate Commerce, and was duly and regularly filed with the Interstate Commerce Commission in accordance with law.

Said last-mentioned rate of 86½ cents per hundred pounds remained in effect until on or about January 10, 1924, upon which date the same was voluntarily reduced to 84 cents per hundred pounds; said last-mentioned rate of 84 cents was duly and regularly established by these defendants and by other common carriers engaged in interstate commerce, and was named in tariffs duly and regularly filed in accordance with law. [283]

Said rates of 86½ cents per hundred pounds and 84 cents per hundred pounds were the rates

which were successfully in effect, and assessed upon complainant's shipments during the period of movement thereof. Said rates are the rates referred to "as charged" upon said list of shipments hereinbefore set forth.

which request was denied by the Court, and the Court refused to find such facts as so requested, and the Court modified, changed, and altered defendants' request; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such facts as requested and in modifying, changing, and altering said request.

7. Said last-mentioned rate of 84 cents per hundred pounds remained in effect until February 25, 1925, upon which date the same was reduced to 71 cents per hundred pounds, pursuant to and in compliance with certain findings and orders made by said Commission in a proceeding known as Docket No. 14449, reported in Volume 95, I. C. C. Reports, at pages 244, and following, in which proceeding the Traffic Bureau of the Phoenix Chamber of Commerce, and certain others were complainants, and in which proceedings said complainants alleged that the rates on sugar from points in California, including the points of origin of the shipments of plaintiff herein, to Phoenix, Arizona, had been, were, and in the future would be, unreasonable. Said report and order of said Commission in said proceeding, Docket No. 14449, were and are as follows:

(Same as Exhibit No. 2 annexed to agreed statement of facts, and reference is hereby made to said Exhibit.)

In compliance with said Commission's order in said Docket No. 14449, the defendants therein, including the defendants in these causes, established, on or about February 25, 1925, a rate of 71 cents per 100 pounds on sugar, in carloads, from all points in California to Phoenix, Arizona, which said rate was duly and regularly published in tariffs filed with said Commission, in accordance with law.

which request was denied by the Court, and the Court refused to find such facts as so requested, and the Court modified, changed, and altered defendants' request; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such facts as requested and in [284] modifying, changing, and altering said request.

8. Thereafter and on February 8, 1927, said Interstate Commerce Commission reopened said proceeding, Docket No. 14449, upon petition of the defendants therein, for oral argument jointly with a subsequent proceeding brought by the Traffic Bureau of the Phoenix Chamber of Commerce and certain others (including plaintiff) as complainants, and known as Docket No. 16742.

In said last-mentioned proceeding, Docket No. 16742, said Commission, on March 12, 1928, made and rendered its opinion and order, re-

ported in Volume 140 of I. C. C. Reports, at pages 171 and following, finding that the rates on sugar, in carloads, from points in California designated as the northern California group (which said group includes, among other points, San Francisco, Crockett, and Spreckels) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 81 cents prior to July 1, 1922, and 73 cents on and after said last-mentioned date, and that said rates on sugar from points in California designated as the Southern California group (which said group includes, among other points, Betteravia and Oxnard, California) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 79 cents prior to July 1st, 1922, and 71 cents on and after said date; and that certain of the complainants in said proceeding (including plaintiff herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceeding to have been reasonable; and that said complainants were entitled to reparation, with interest. Said report and order of said Commission in said Docket No. 16742, were and are as follows:

(Same as Exhibit No. 3 annexed to agreed statement of facts, and reference is hereby made to said Exhibit.)

Said list of shipments hereinbefore set forth shows in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in these causes, in accordance with the tariffs duly published and in effect at the dates of movement, and the charges which would have accrued thereon, upon the basis of the rates declared by said Commission in said last-mentioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the differences between the charges so assessed and those which would have accrued, which said last-mentioned differences constitute the amounts herein claimed by the plaintiff, exclusive of interest, and fees of its attorneys and counsel.

which request was denied by the Court, and the Court refused [285] to find such facts as so requested, and the Court modified, changed, and altered defendants' request; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such facts as requested and in modifying, changing, and altering said request.

CONCLUSIONS OF LAW.

1. That the rates and charges assessed and collected upon plaintiff's said shipments, as shown upon said list above set forth, were published and collected by authority of a formal continuing order of the Interstate Commerce

Commission, and had previously been established and declared by said Commission to be not unreasonable, after formal investigation and/or were less in amount than rates which had been specifically prescribed and declared by said Commission to be not unreasonable after such formal investigation,

which request was denied by the Court, and such conclusion was refused; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such conclusion of law, and in denying such request.

2. That said order of said Interstate Commerce Commission dated the 11th day of March, 1929, purporting to order and direct these defendants to pay reparation to the plaintiff with respect to its said shipments hereinbefore listed, is null and void and of no effect, because said Commission was and is without lawful jurisdiction and authority under the Interstate Commerce Act to make said order, for the following reasons:

(a) Said Interstate Commerce Act does not vest said Commission with jurisdiction and authority to award reparation with respect to charges collected upon the basis of rates which said Commission has theretofore specifically prescribed or approved as reasonable and just for the future by a formal continuing order, or with respect to charges collected upon the basis of rates which are less in amount than

rates so prescribed and/or approved as just and reasonable.

(b) If said Act were so construed as to confer such jurisdiction and authority upon said Commission, it would to that extent be unconstitutional, and any and all orders made in pursuance of said purported jurisdiction would likewise be unconstitutional and void, because contrary to and forbidden by the Fifth Amendment to the United States Constitution, and particularly those portions of said Amendment which guarantee that no person shall be deprived of property without due process of law. [286]

which request was denied by the Court, and such conclusion was refused; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such conclusion of law, and in denying such request.

3. That the plaintiff has failed to establish by the evidence any cause of action whatever against the defendants, or any of them, and has failed to establish that any unreasonable or unlawful rate or charge was collected upon any of its said shipments, or that any reparation whatsoever is due or payable with respect to said shipments, or any of them.

which request was denied by the Court, and such conclusion was refused; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such conclusion of law, and in denying such request.

4. That the plaintiff is not entitled to recover any amount whatsoever as and for fees of its attorneys and counsel in these causes.

which request was denied by the Court, and such conclusion was refused; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such conclusion of law, and in denying such request.

5. That the defendants are entitled to judgment against the plaintiff, that the plaintiff take nothing by its causes of action, or either of them, and that the complainants herein be dismissed.

Wherefore, defendants pray that the Court render and enter judgment in their favor in each of the causes above named in accordance herewith.

which request was denied by the Court, and the Court refused to find such conclusion of law, and refused to render or enter judgment in favor of the defendants; and the defendants by their counsel then and there duly excepted to the ruling of the Court in failing to find such conclusion of law and in denying such request, and in failing to render judgment in favor of the defendants.

Thereupon, the Court did then and there in open court find the facts and conclusions of law as follows, which were afterwards reduced to writing and filed by the Court in the causes in the following words and form, to wit: [287]

(Title of Court and Cause—Nos. L.-595 and L.-596—Phoenix.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

These causes were, by written agreement of the parties, duly filed, consolidated for purposes of trial and decision, and were jointly tried upon a consolidated record by the Court on the 8th day of January, 1930, a trial by jury having been duly waived by written stipulation of the parties. Plaintiff and defendants, by and through their respective attorneys and counsel, filed with the Court a written agreed statement of facts; and plaintiff offered certain documentary testimony in support of its complaint; and, pursuant to stipulation, the parties subsequently, on the 23d day of June, 1930, offered certain oral testimony with respect to the matter of the fees to be allowed to plaintiff's attorneys and counsel; and the Court was duly requested in writing to make, enter, and file special findings of fact in said causes, prior to rendering judgment.

The Court does hereby make and file the following as its findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Plaintiff now is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Arizona, and qualified to do business in said State.

2. Defendants Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company, and Santa Maria Valley Railroad Company now

are, and at all times herein mentioned have been, corporations duly organized and existing as such, and engaged in the operation of lines of railroad, pursuant to the authority of law, as common carriers for hire, and in the transportation of property by means of their lines of railroad and in conjunction with their conjunction with their connecting carriers, in interstate commerce from points in the State of California to points in the State of Arizona. [288]

Defendant Bay Transport Company now is, and at all times herein mentioned was, a corporation duly organized and existing as such, and engaged in the transportation of freight by water, in interstate commerce, as a connection of the railroad corporations hereinbefore referred to.

3. Heretofore, and at various dates between the 6th of February, 1923, and the 10th day of February, 1925, said plaintiff shipped or caused to be shipped from San Francisco, Crockett, Oxnard, Betteravia, and Spreckels, California, to Phoenix, Arizona, over the lines of said defendants, eighty-two carload shipments of sugar; that said shipments are severally set forth upon the following list, which correctly shows in detail the dates upon which said shipments were made, the dates upon which the charges for the transportation thereof were collected, the car initials and numbers of the cars in which the same were loaded and transported, the several points of origin thereof, the several weights of said shipments, the rates thereon assessed, and the charges thereon collected, the rates subsequently found by the Interstate Commerce

Commission to have been reasonable, and the accounts which would have accrued under said last-mentioned rates (said last-mentioned rates and amounts being shown under the columns headed "as should be"), and the amount of reparation claimed by the plaintiff and allowed by said Commission with respect to each of said shipments:

The following is a list of shipments involved in Cause No. L.–695: [289]

Claim No. 806-2 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Sugar, Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via A. T. S. F. Ry. Co.						
1923	1923									
2-24	2-26	AT	26966	San Francisco	60450	86½	522.89	73	441.29	81.60
7-25	7-31	AT	36212	San Fran.	61152	86½	528.96	73	446.41	82.55
8-30	9-06	AT	116775	"	60758	86½	525.56	73	443.53	82.03
10- 4	10- 9	AT	34714	"	60819	86½	526.08	73	443.98	82.10
11-16	11-21	AT	43738	"	61093	86½	528.45	73	445.98	82.47
11-23	11-30	AT	63696	"	68450	86½	592.09	73	499.69	92.40
12- 1	12- 7	AT	116509	"	61115	86½	528.84	73	446.14	82.50
1924	1924									
1- 2	1- 7	AT	116055	"	60725	86½	525.27	73	443.29	81.98
1-11	1-17	AT	118045	"	61316	84	515.05	73	447.61	67.44
1-16	1-21	AT	39566	"	83955	84	705.22	73	612.87	92.35

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Separation.
				Routed via A. T. S. F. Ry. Co.						
1924	1924									
1–18	1–24	AT	46224	San Fran.	60619	84	509.20	73	442.52	66.68
1–25	1–30	AT	27562	"	60715	84	510.01	73	443.22	66.79
2– 4	2– 8	AT	32233	"	60770	84	510.47	73	443.62	66.85
2–20	2–26	AT	116304	"	60832	84	510.99	73	444.07	66.92
3–20	3–24	AT	118181	"	61224	84	514.28	73	446.94	67.34
5–17	5–22	AT	116599	"	61009	84	512.48	73	445.37	67.11
6– 3	6– 9	AT	117726	"	61195	84	514.08	73	446.72	67.36
7– 7	7–14	AT	116356	"	60732	84	510.15	73	443.34	66.81
7–29	8– 4	AT	46535	"	61065	84	512.95	73	445.77	67.18
8–23	8–28	AT	38975	"	60959	84	512.06	73	445.00	67.06
9– 4	9– 9	AT	35968	"	60770	84	510.47	73	443.62	66.85
9–24	9–29	AT	117847	"	60915	84	511.69	73	444.68	67.01
[290]										
1923	1923									
2– 6	2–13	ATZ	33480	San Fran.	60625	86½	524.41	73	442.56	81.85

The following is a list of shipments involved in Cause No. L.-695.

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via A. T. S. F. Ry. Co.						
1924	1924									
9-27	10- 3	AT	116476	San Francisco	60713	84	509.99	73	443.20	66.79
11-21	11-28	AT	65098	"	60871	84	511.32	73	444.36	66.96
12-27	12-31	AT	63603	"	60812	84	510.82	73	443.93	66.89
	1925									
12-29	1- 3	AT	130017	"	80905	84	679.60	73	590.61	88.99
1925	1925									
1-22	1-25	AT	360.86	"	61222	84	514.26	73	446.92	67.34
1-30	2- 4	AT	65112	"	60512	84	508.30	73	441.74	66.56
2- 3	2- 6	AT	43806	"	60700	84	509.88	73	443.11	66.77
2- 5	2-10	AT	47163	"	60737	84	510.19	73	443.38	66.81

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via B. T. Co., San Francisco AT. SF. Ry.Co.						
1923	1923									
2–16	2–23	NYC	246308	Crockett	60456	86½	522.90	73	441.33	81.57
2–28	3– 6	AT	26875	"	60450	86½	522.90	73	441.29	81.61
5– 9	5–15	AT	27269	"	60450	86½	522.90	73	441.29	81.61
6– 1	6– 7	AT	32244	"	61138	86½	528.84	73	446.31	82.53
6–14	6–19	AT	34050	"	60751	86½	525.50	73	443.48	82.02
7–31	8– 7	AT	27200	"	60717	86½	525.21	73	443.23	81.98
8– 9	8–15	AT	49701	"	60717	86½	525.21	73	443.23	81.98
8–22	8–29	AT	48544	"	83093	86½	718.75	73	606.58	112.17
9–28	10– 4	AT	38360	"	60690	86½	524.79	73	443.04	81.93
12–14	12–19	NOTM	2480	"	60781	86½	525.75	73	443.70	82.05
1924	1924									
2–20	2–26	AT	22637	"	60882	84	511.41	73	444.44	66.97
3– 3	3– 7	AT	33848	"	60986	84	512.29	73	445.20	67.09
5– 1	5– 6	AT	35949	"	60966	84	512.12	73	445.05	67.07

Date Shipt.	Date of Collection	Car Init.	Car No.	Point of Origin (Calif.)	Weight	As Collected Rate	As Collected Amt.	As Should be Rate	As Should be Amt.	Reparation
				Routed via B. T. Co., San Francisco AT. SF. Ry. Co.						
1924	1924									
6-28	7- 2	AT	63056	Crockett	60690	84	509.80	73	443.04	66.76
8-14	8-19	AT	31198	"	60809	84	510.80	73	443.91	66.89
				Routed via S. P. Bay Point A. T. & S. F. Ry. Co.						
1923	1923									
4-30	5- 7	SP	35299	Crockett	60737	86½	525.38	73	443.38	82.00
	1924									
12-29	1- 4	DIW	38646	"	60723	86½	525.25	73	443.28	81.97
1924	1924									
2- 3	2-11	SSW	25848	"	60692	84	509.81	73	443.05	66.76
				Routed via S. P. Los Angeles, A. T. & S. F. Ry.						
2-20	2-28	CM&St.P.	92364	Spreckles	60450	84	507.78	73	441.29	66.49
							$26483.38		$22731.59	$3751.79

[291]

The following is a list of shipments involved in Cause No. L.–696.

Claim No. 805–1 of the Arizona Grocery Company, Under the Decision of the Interstate Commerce Commission in Docket No. 16742—on Sugar Carloads—Destination, Phoenix, Arizona.

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1923	1923									
2–22	3– 1	CM&St.P	87286	Crockett	60789	86½	525.82	73	443.76	82.06
3–13	3– 2	GH&SA	50987	San Fr.	60896	86½	526.75	73	444.54	82.21
3–20	3–28	SP	87745	"	60813	86½	526.03	73	443.93	82.10
4–25	5– 2	SP	35005	"	60788	86½	525.82	73	443.75	82.07
5–12	5–19	SP	27309	"	60838	86½	526.25	73	444.12	82.13
6–27	7–10	SP	16940	"	81023	86½	700.85	73	591.47	109.38
9–14	9–20	SP	26505	Oxnard	60450	86½	522.89	71	429.20	93.69
9–19	9–26	SP	35048	San Fr.	60838	86½	526.25	73	444.12	82.13
10–11	10–18	SP	21533	Oxnard	60450	86½	522.89	71	429.20	93.69

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Repara-tion.
				Routed via Southern Pacific Ry.						
1924	1924									
2- 5	2-12	CGW	29228	Oxnard	60450	84	507.78	71	429.20	78.58
3-22	3-28	SP	16776	San Fr.	60750	84	510.30	73	443.48	66.82
3-29	4- 9	SP	29047	"	60782	84	510.67	73	443.71	66.86
4-11	4-17	NYC	248647	"	60940	84	511.90	73	444.86	67.04
6-14	6-20	NYC	51840	Cro'kt	60651	84	509.47	73	442.75	66.72
6-24	7- 2	SP	28501	San Fr.	60964	84	512.10	73	445.04	67.06
6-25	7- 2	SP	81424	Crckt.	60678	84	509.70	73	442.95	66.73
8-16	8-25	Sou.	135043	"	60657	84	509.52	73	442.30	66.72
8-28	9- 2	SP	16630	"	60733	84	510.16	73	443.35	66.81
9-18	9-24	SP	81461	"	60690	84	509.80	73	443.04	66.76
9-25	10- 1	LW	32523	"	60677	84	509.69	73	442.94	66.75
11- 5	11-14	MK&T	68173	San Fr.	61253	84	514.53	73	447.15	67.38
11-13	11-18	SP	30000	Crckt.	60679	84	509.70	73	442.96	66.74
12- 1	12- 8	SP	28487	"	60640	84	509.38	73	442.67	66.71

Date Shipt.	Date Chgs. Paid	Car Init.	Car No.	Origin (Calif.)	Weight	As Charged Rate	As Charged Amt.	As Should be Rate	As Should be Amt.	Reparation.
				Routed via Southern Pacific Ry.						
1924	1924									
12– 3	12– 9	SP	30791	San Fr.	60669	84	509.62	73	442.88	66.74
12–15	12–22	SP	21267	Crckt.	90707	84	761.94	73	662.16	99.78
1925	1925									
1– 7	1–13	SP	29825	San Fr.	60983	84	512.25	73	445.18	67.07
1–14	1–19	SP	27862	"	60890	84	511.48	73	444.50	66.98
1–29	2– 4	SSW	27113	Crckt.	60676	84	509.68	73	442.93	66.75
1923	1923			Routed via S. M. V. R. R. Co.—S. P. Co.						
9–16	9–20	SP	16564	Bttrava	60450	86½	522.89	71	429.20	93.69
9–28	10– 5	LW	32484	"	60450	86½	522.89	71	429.20	93.69
10– 9	10–16	SP	87173	"	60450	86½	522.99	71	429.20	93.79
1924	1924									
6–16	6–23	GH	50670	"	60450	84	507.78	71	429.20	78.58
				Total, ...			$16,929.67		$14,465.44	2464.23

4. On the 22d day of June, 1921, in a proceeding before the Interstate Commerce Commission known as Docket 11,532, entitled "Traffic Bureau, Phoenix Chamber of Commerce, et al., complainants, v. Director General, et al., defendants" (to which proceeding Arizona Grocery Company, a copartnership, predecessor in interest of the plaintiff herein, was a party complainant), upon a complaint alleging that the rates on sugar in carloads from points in California (including all points in said state referred to in said list or shipments hereinbefore set forth) to Phoenix had been, were, and in the future would be unreasonable in violation of the Interstate Commerce Act, said Commission after due hearing and investigation duly made and rendered its opinion and order in said proceeding dated June 22d, 1921, which said opinion is reported in volume 62, I. C. C. Reports, at pages 412 and following. Said report and order fixed a maximum rate of 96½¢ per hundred pounds on sugar in carloads from points in California, including all points in said state referred to in said list of shipments hereinbefore set forth to Phoenix, Arizona. Thereafter the defendants in said proceedings before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly filed and published their tariffs effective September 17, 1921, and naming a rate of 96 cents per hundred pounds on sugar, in carloads, from points in California to Phoenix, Arizona, which said rate was one-half cent less than the rate of 96½ cents per hundred pounds found as

a maximum rate for the future by said commission in said Docket No. 11,532.

Said rate of 96 cents per 100 pounds remained in effect until on or about July 1, 1922, upon which date, in accordance with the recommendations made by said Commission in a report in a proceeding known as Docket No. 13,293, Reduced Rates 1922, reported in Volume 68, I. C. C. Reports, at pages 676 and following, said rate of 96 cents was voluntarily reduced [293] to 86½ cents per hundred pounds; said last-mentioned rate of 86½¢ per hundred pounds was named in tariffs of said defendants herein, and of other carriers engaged in interstate commerce, and was duly and regularly filed with the Interstate Commerce Commission in accordance with law.

Said last-mentioned rate of 86½ cents per hundred pounds remained in effect until on or about January 10, 1924, upon which date the same was voluntarily reduced to 84 cents per hundred pounds; said last-mentioned rate of 84 cents was duly and regularly established by these defendants, and was named in tariffs duly and regularly filed in accordance with law.

Said rates of 86½ cents per hundred pounds and 84 cents per one hundred pounds were the rates which were successively in effect, and assessed upon complainant's shipments during the period of movement thereof. Said rates are the rates referred to "as charged" upon said list of shipments hereinbefore set forth.

5. Said last-mentioned rate of 84 cents per hundred pounds remained in effect until February 25, 1925, upon which date the same was reduced to 71 cents per 100 pounds, pursuant to and in compliance with certain findings and orders made by said Commission in a proceedings known as Docket No. 14,449, reported in Volume 95, I. C. C. Reports, at pages 244 and following, in which proceeding the Traffic Bureau of the Phoenix Chamber of Commerce, and certain others were complainants, and in which proceedings said complainants alleged that the rates on sugar from points in California, including the points of origin of the shipments of plaintiff herein, to Phoenix, Arizona, had been, were, and in the future would be, unreasonable.

In compliance with said Commission's order in said Docket No. 14,449, the defendants therein, including the defendants in these causes, established, on or about February 25, [294] 1925, a rate of 71 cents per 100 pounds on sugar, in carloads, from all points in California to Phoenix, Arizona, which said rate was duly and regularly published in tariffs filed with said Commission, in accordance with law.

6. Thereafter and on February 8, 1927, said Interstate Commerce Commission reopened said proceeding, Docket No. 14,449, upon petition of the defendants therein, for oral argument jointly with a subsequent proceedings brought by the Traffic Bureau of the Phoenix Chamber of Commerce and certain others (including plaintiff) as complainants, and known as Docket No. 16,742.

In said last-mentioned proceedings, Docket No. 16,742, said Commission, on March 12, 1928, made

and rendered its opinion and order, reported in Volume 140 of I. C. C. Reports, at pages 171 and following, finding that the rates on sugar, in carloads, from points in California designated as the northern California group (which said group includes, among other points, San Francisco, Crockett, and Spreckels) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 81 cents prior to July 1, 1922, and 73 cents on and after said last-mentioned date, and that said rates on sugar from points in California designated as the southern California group (which said group includes, among other points, Betteravia, and Oxnard, California) to Phoenix, Arizona, had in the past been unreasonable to the extent that they exceeded 79 cents prior to July 1st, 1922, and 71 cents on and after said date; and that certain of the complainants in said proceeding (including plaintiff herein) had made shipments at the rates found in said proceeding to have been unreasonable; that they had paid and borne the charges thereon and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceeding to have been reasonable; and that said complainants were entitled to reparation, with interest. [295] Said list of shipments hereinbefore set forth shows in detail, as previously stated, the charges actually assessed upon plaintiff's shipments involved in these causes, in accordance with the tariffs duly published and in effect at the dates of movement, and the charges which would have accrued thereon, upon the basis

of the rates declared by said Commission in said last-mentioned report and order to have been the reasonable rates to have been applied at said dates of movement, together with the differences between the charges so assessed and those which would have accrued, which said last-mentioned differences constitute the amounts herein claimed by the plaintiff, exclusive of interest, and fees of its attorneys and counsel.

7. That said freight charges assessed plaintiff on the list of shipments hereinbefore set forth, same being the shipments involved in these causes, were and are unreasonable to the plaintiff and in violation of the Interstate Commerce Act of February 4, 1887, and the acts of Congress amendatory thereto.

8. That the just and reasonable freight rates which should have been charged on all of said shipments hereinbefore set forth from said points of origin in California to said point of destination in Arizona after the first day of July, 1922, and up to and including the 10th day of February, 1925 was 73¢ per hundred pounds from Spreckels, Crockett and San Francisco, California, and 71¢ per hundred pounds from Oxnard and Betteravia, California.

9. That the plaintiff did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations.

10. Heretofore, and on the 11th day of March, 1929, the Interstate Commerce Commission duly

made and rendered its supplemental order in said Docket No. 16,742, and cases consolidated [296] therewith, ordering and directing the defendants to pay unto the plaintiff the following sums, to wit:

Southern Pacific Company	$2104.50
Southern Pacific Company and Santa Maria Valley Railroad Company	359.75
The Atchison, Topeka and Santa Fe Railroad Company	2203.55
The Atchison, Topeka and Santa Fe Railroad Company and Bay Transport Company	1251.02
The Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Company ..	297.04

together with interest at the rate of 6 per cent per annum from the respective dates of the payment of the charges as shown on said list of shipments above set forth. Said last-mentioned order required the payment of said sums on or before April 26, 1929, and stated that the same were as reparation on account of unreasonable rates charged for the transportation of certain carload shipments of sugar from points in California to points in Arizona. Defendants have failed and refused to comply with said order, or to pay said sums, or any part thereof, to the plaintiff, although demand and request therefor have heretofore been duly made by the plaintiff upon said defendants.

11. That by reason of said unreasonable rates and charges and payment thereof by the plaintiff

and by reason of the refusal of the defendants to pay said reparations so awarded by the Interstate Commerce Commission, plaintiff is damaged by the defendants, Atchison, Topeka and Santa Fe Railroad, Bay Transport Company, and Southern Pacific Company in the total amount of $3,751.61, together with interest thereon at the rate of 6 per cent per annum from the respective dates of payment and plaintiff is damaged by the defendants, Southern Pacific Company and Santa Maria Valley Railroad Company in the total sum of $3,464.33, together with interest thereon [297] at the rate of 6 per cent per annum from the respective dates of payment.

12. That the plaintiff was required to employ attorneys at law to prosecute the present actions in order to effect collection of said reparations and that 20 per cent of the total amount due including interest and principal in both of said causes is reasonable as attorneys' fees:

CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Court finds as conclusions of law, as follows:

I.

That the order of the Interstate Commerce Commission, dated March 11, 1929, and made and entered in that certain proceeding before said Commission entitled Traffic Bureau of Phoenix Chamber of Commerce et al. vs. A. T. & S. F. Railroad Company et al., Docket No. 16,742, which order

required said defendants to pay to the plaintiff herein certain sums of money, as set forth in said order and in plaintiff's complaint, was and is a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause and was within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said order the said Interstate Commerce Commission acted within its jurisdiction and power;

II.

(A) That the rates of 86½ cents and 84 cents per hundred pounds charged the plaintiff by the defendants between the 6th day of February, 1923, and the 10th day of February, 1925, on shipments of fifty carloads of sugar originating at San Francisco, Crockett, and Spreckels in the State of California, as shown on the list of shipments hereinbefore set forth, were, as found by the Interstate Commerce Commission in said [298] proceeding unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds after July 1, 1922, up to and including the 10th day of February, 1925, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines was 73 cents per hundred pounds between said dates;

(B) That the rates of 86½ and 84 cents per hundred pounds charged plaintiff by the defendant

between the 21st day of February, 1923, and the 5th day of February, 1925, on shipments of thirty-two carloads of sugar originating at San Francisco, California, Crockett, California, Oxnard, California, and Betteravia, California, as shown on the list of shipments hereinbefore set forth, were as found by the Interstate Commerce Commission in said proceeding known as docket #16,742, unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on all of said shipments from Crockett, California, and San Francisco, California, to Phoenix, Arizona, after the date of July 1, 1922, and up to and including the 5th day of February, 1925; and 71 cents per hundred pounds on all of said shipments from Oxnard, California and Betteravia, California, to Phoenix, Arizona, after the first day of July, 1922, and up to and including the 5th day of February, 1925;

And that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants lines during said dates was 73 cents per hundred pounds on all said shipments from Crockett, California, and San Francisco, California, to Phoenix, Arizona, and 71 cents per hundred pounds on all shipments between said dates from Oxnard, California and Betteravia, California;

III.

(A) That in cause No. L.–695 by reason of said [299] unreasonable charges the plaintiff has been damaged and the defendants, and each of them, be-

came and are jointly and severally indebted to the plaintiff in the sum of $3,751.61, principal, together with interest at the rate of six per cent per annum from the respective dates of payment of the charges as shown on the list of shipments hereinbefore set forth, amounting to the sum of $1,444.14, and attorneys' fees of 20 per cent of the total amount of said indebtedness, including principal and interest, amounting to the sum of $1,039.19, together with the other lawful costs incurred by plaintiff in said action, and that plaintiff is entitled to judgment therefor.

(B) That in cause No. L.–696 by reason of said unreasonable charges, the plaintiff has been damaged and the defendants and each of them, became and are jointly and severally indebted to the plaintiff in the sum of $2,464.33, together with interest at the rate of 6 per cent per annum from the respective dates of payment of the charges as shown on the list of shipments hereinbefore set forth, amounting to the sum of $933.91, and attorneys' fees of 20 per cent of the total amount of said indebtedness, including principal and interest, amounting to the sum of $675.60, together with the other costs incurred by plaintiff in said action and the plaintiff is entitled to judgment therefor.

Dated this 15th day of July, 1930.

F. C. JACOBS,

Judge of the District Court. [300]

Thereupon the defendants did by their counsel in open court duly except to the findings of fact

and conclusions of law of the court in the following particulars, to wit:

Defendants excepted to paragraph 4 of the Court's findings of fact for the reasons that in said paragraph and finding the Court did not set out in full the report and order of the Interstate Commerce Commission referred to, as requested by defendants in paragraph 6 of their requested findings; and for findings that said report and order fixed the maximum rate of 96½¢ per hundred pounds on sugar in carloads; and for not finding that the said Commission in said order found said rate of 96½¢ not unreasonable for the future as requested by defendants in pagagraph 6 of their requested findings.

Defendants excepted to paragraph 5 of the Court's findings of fact for the reason that in said paragraph and finding the Court did not set out in full the report and order of the Interstate Commerce Commission referred to as requested by defendants in paragraph 7 of their requested findings.

Defendants excepted to paragraph 6 of the Court's findings of fact for the reason that in said paragraph and finding of the Court did not set out in full the report and order of the Interstate Commerce Commission referred to as requested by defendants in paragraph 8 of their requested findings.

Defendants excepted to paragraph 7 of the Court's findings of fact upon the ground that the

same is not supported by the evidence and is contrary to the evidence and to the law.

Defendants excepted to paragraph 8 of the Court's findings of fact upon the ground that the same is not [301] supported by the evidence, and is contrary to the evidence and to the law.

Defendants excepted to paragraph 9 of the Court's findings of fact upon the ground that the same is not supported by the evidence, and is contrary to the evidence and to the law.

Defendants excepted to paragraph 11 of the Court's findings of fact upon the ground that the same is not supported by the evidence, and is contrary to the evidence and to the law.

Defendants excepted to paragraph 12 of the Court's findings of fact upon the ground that the same is not supported by the evidence, and is contrary to the evidence and to the law.

Defendants excepted to the conclusion of law contained and set forth in paragraph I of the Court's conclusions of law upon the ground that such conclusion is not sustained by the evidence, and is contrary to the law.

Defendants excepted to the conclusion of law contained and set forth in subdivision A of paragraph II of the Court's conclusions of law upon the ground that such conclusion is not sustained by the evidence, and is contrary to the law.

Defendants excepted to the conclusion of law contained and set forth in subdivision B of paragraph II of the Court's conclusions of law upon

the ground that such conclusion is not sustained by the evidence, and is contrary to the law.

Defendants excepted to the conclusion of law contained and set forth in subdivision A of paragraph III of the Court's conclusions of law, upon the ground that such conclusion is not sustained by the evidence, and is contrary to the [302] law.

Defendants excepted to the conclusion of law contained and set forth in subdivision B of paragraph III of the Court's conclusions of law, upon the ground that such conclusion is not sustained by the evidence, and is contrary to the law.

Thereafter, to wit, on the 15th day of July, 1930, the Court's written findings of fact and conclusions of law as aforesaid were filed in said causes, and thereupon and on said July 15, 1930, the Court, upon motion of the attorney for the plaintiff, rendered and entered judgment in said cause No. L.-695—Phoenix in favor of the plaintiff and against the defendants The Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, and Southern Pacific Company for the principal sum of $3,751.61, together with interest thereon in the amount of $1,444.44, together with plaintiff's costs taxed at $1,064.94, of which 1,039.19 was adjudged by the Court to be reasonable attorneys' fees to be allowed the plaintiff for services rendered by its attorneys in the said cause up to the date of the judgment; all of said amounts to bear interest at the rate of 6% per cent per annum until paid, to which said judgment of the Court and every part and portion thereof the said defendants by their

counsel then and there duly excepted; and upon said last-mentioned date the Court rendered and entered judgment in cause No. L.–696—Phoenix in favor of the plaintiff and against the defendants Southern Pacific Company and Santa Maria Valley Railroad Company for the principal sum of $2,464.33, together with interest thereon in the amount of $933.91, together with plaintiff's costs taxed at $685.60, of which $675.60 was adjudged by the Court to be reasonable attorney's fees to be allowed the plaintiff for services rendered by its attorneys in the said cause up to the date of the judgment; all of said amounts to bear interest at the rate of [303] 6% per annum until paid; to which said judgment of the Court and every part and portion thereof the said defendants by their counsel then and there duly excepted.

That thereafter and on or about the 15th day of July, 1930, the plaintiff by its counsel filed a statement of costs, together with a notice of the time and place of application to tax costs in each of the above causes, and in said statement in cause No. L.–695—Phoenix said plaintiff claimed as attorneys' fees the sum of $1,039.19, and in cause No. L.—696 the sum of $675.60; and the defendants by their counsel filed written objections and exceptions to said items of attorneys' fees in both of said causes. Thereafter, to wit, on the 17th day of July, 1930, the Clerk of said District Court and the Judge thereof, over the objection of the defendants, did allow said items of attorneys' fees as proper items

of costs, to which said ruling and order the defendants then and there duly excepted.

And the defendants pray that this, their bill of exceptions, may be allowed, settled and signed.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
A. B. MASON,
J. E. LYONS,
GERALD E. DUFFY,
Attorneys for Defendants. [304]

Service upon plaintiff of the foregoing proposed bill of exceptions on this 20th day of September, 1930, is hereby admitted and allowed, and the said plaintiff does hereby waive all time allowed it by rule or statute for objections or suggested amendments to said bill of exceptions, and does hereby agree and stipulate that said bill of exceptions is correct and the same may be settled and allowed upon presentation to the Judge of the above-entitled District Court.

ELLIOTT & SNELL,
Attorneys for Plaintiff.

This is to certify that the foregoing bill of exceptions tendered by the defendants is correct in every particular and contains all evidence and testimony introduced at any and all hearings and trials of the said causes, and the said bill of exceptions is hereby settled and allowed, and made a part of the record of this cause.

Done in open court this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court in and for the District of Arizona.

Filed Sep. 29, 1930. [305]

[Title of Court and Cause—No. L.-695—Phoenix.]

PETITION FOR APPEAL.

Comes now The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, being the defendants above named, and say that on or about the 15th day of July, 1930, judgment in this cause was rendered by this Court in favor of the plaintiff, Arizona Grocery Company, a corporation, and against the said defendants, The Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, and Southern Pacific Company, by which said defendants were aggrieved. That in said judgment and the proceedings had prior and subsequent thereto in this cause certain errors were committed to the prejudice of the said defendants, all of which will appear in detail from the assignments of error filed with this petition.

WHEREFORE, said defendants, The Atchison, Topeka, & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and

Southern Pacific Company, a [306] corporation, hereby pray that an appeal may be allowed to them to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that a citation on appeal be issued as provided by law; and that a duly authenticated transcript of the record, proceedings, and all papers and documents herein may be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the law and the rules of such court in such cases made and provided; and defendant further prays that this court fix the amount of the cost and/or supersedeas bond to be given by the defendants in this cause; and that such other and further proceedings may be had as may be proper in the premises.

Dated at Phoenix, Arizona, this 23d day of September, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
A. B. MASON,
J. E. LYONS,
GERALD E. DUFFY,
Attorneys for Defendants and Appellants.

Filed Sep. 23, 1930. [307]

[Title of Court and Cause—No. L.-696—Phoenix.]

PETITION FOR APPEAL.

Comes now Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Com-

pany, a corporation, being the defendants above named, and say that on or about the 15th day of July, 1930, judgment in this case was rendered by this court in favor of the plaintiff, Arizona Grocery Company, a corporation, and against the said defendants, Southern Pacific Company and Santa Maria Valley Railroad Company, by which said defendants were aggrieved. That in said judgment and the proceedings had prior and subsequent thereto in this cause certain errors were committed to the prejudice of the said defendants, all of which will appear in detail from the assignments of error filed with this petition.

WHEREFORE, said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, hereby pray that an appeal may be allowed to them to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, [308] and that a citation on appeal be issued as provided by law; and that a duly authenticated transcript of the record, proceedings, and all papers and documents herein may be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the law and the rules of such court in such cases made and provided; and defendant further prays that this Court fix the amount of the cost and/or supersedeas bond to be given by the defendants in this cause; and that such other and further proceedings may be had as may be proper in the premises.

Dated at Phoenix, Arizona, this 23d day of September, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
A. B. MASON,
J. E. LYONS,
GERALD E. DUFFY,
Attorneys for Defendants and Appellants.

Filed Sep. 23, 1930. [309]

[Title of Court and Cause—Nos. L.-695, L.-696—Phoenix.]

ASSIGNMENTS OF ERROR.

Come now the defendants in the above-entitled causes, The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, Santa Maria Valley Railroad Company, a corporation, and Southern Pacific Company, a corporation, and in connection with their petitions for appeal therein, make the following assignments of error which they aver occurred upon the trial of said causes or were committed by the court in the findings of fact, or in the conclusions of law, or in the rendition of judgments, or in prior proceedings in said causes:

I.

The court erred in finding the following facts, to wit:

"Said report and order (referring to the

report and order of the Interstate Commerce Commission in Docket No. 11,532, Traffic Bureau etc. v. Director General, et al., 62 I. C. C. 412) fixed a maximum rate [310] of 96½ cents per 100 pounds on sugar in carloads from points in said states referred to in said list of shipments hereinbefore set forth, to Phoenix, Arizona. Thereafter, the defendants in said proceedings before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly published their tariffs effectively September 17, 1921, and naming a rate of 96 cents per 100 pounds of sugar in carloads from points in California to Phoenix, Arizona, which said rate was one-half cent less than the rate of 96½ cents per 100 pounds found as a maximum rate for the future by said Commission in said Docket No. 11532,"

said findings of fact being contained in paragraph 4 of special findings of fact found by the Court, for the reason that there is no competent evidence to sustain such findings, and the same are not supported by, and are contrary to, the evidence and the law; the particular error of the Court herein asserted being its use of the language underlined in the foregoing quotation.

II.

The court erred in refusing to find the following facts, which were requested by the defendants, to wit:

"Said report and order (referring to the report and order of the Interstate Commerce Commission in Docket No. 11532, Traffic Bureau, etc., v. Director General, et al., 62 I. C. C. 412) were and are as follows": (Here follows in the findings of fact requested by the defendants a true and correct copy of the opinion and order of said Commission in said proceeding, Docket No. 11532; a copy of said opinion and order are likewise set out in full, as Exhibit No. 1 annexed to the agreed statement of facts herein. "To save repetition reference is hereby made to defendants' requested findings of fact and to said agreed statement of facts.) "Thereafter, the defendants in said proceeding before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly filed and published their tariffs effective September 17, 1921, complying with the Commission's order in said Docket No. 11532, and naming a rate of 96 cents per 100 pounds on sugar in carloads from points in California to Phoenix, Arizona, which said rate was one-half cent less than the rate of 96½ cents per 100 pounds found not unrea-

sonable for the future by said Commission in said Docket No. 11532,"

said requested findings being contained in paragraph 6 of special findings of fact and conclusions of law requested by the defendants; the court's findings quoted above, to which assignment of error No. 1 is directed, having been substituted by the court in lieu of [311] the language herein last above quoted; for the reason that such proposed findings of fact, requested by the defendants, were conclusively proven by the evidence, and such proposed findings were and are material to the issues.

III.

The court erred in refusing to find the following fact, and in refusing to incorporate said finding of fact in paragraph 5 of the findings of fact found by the court, as requested by the defendants, to wit:

"Said report and order of said Commission in said proceeding, Docket No. 14449, were and are as follows": (Here follows, in the special findings of fact and conclusions of law requested by defendants, a full, true and correct copy of the opinion and order of the Interstate Commerce Commission in Docket No. 14449, Traffic Bureau, etc., v. A. T. & S. F. Ry. Co., et al., 95 I. C. C. 244; a full, true and correct copy of said opinion and order is likewise attached as Exhibit No. 2 to the agreed statement of facts on file herein; and to save repetition reference is hereby made to defendants'

requested findings of fact and to said agreed statement of facts.)

such requested finding being contained in paragraph 7 of special findings of fact and conclusions of law requested by defendants; said paragraph 7 of defendants' requested findings of fact having been adopted *verbatim* by the court as paragraph 5 of its special findings of fact, with the exception of the finding above quoted; for the reasons that such fact was conclusively proven by the evidence, and was admitted and uncontradicted, and the finding is material to the issue of the cases.

IV.

The court erred in refusing to find the following facts, and in refusing to incorporate said finding of fact in paragraph 6 of findings of fact found by the court, as requested by the defendants, to wit:

"Said report and order of said Commission in said Docket No. 16742, were and are as follows": (Here follows, in the special findings of fact and conclusions of law requested by defendants, a full, true and correct copy of the report and order of the Interstate Commerce [312] Commission in Docket No. 16742, Traffic Bureau, etc., v. A. T. & S. F. Ry. Co., et al., 140 I. C. C. 171; a full true and correct copy of said opinion and order are likewise attached as Exhibit No. 3 to the agreed statement of facts on file herein; and to save repetition reference is hereby made to defendants' re-

quested findings of fact and to said agreed statement of facts.)

said requested finding being contained in paragraph 8 of special findings of fact and conclusions of law requested by defendants; said paragraph 8 of defendants' requested findings of fact having been adopted *verbatim* by the court as paragraph 6 of its special findings of fact, with the exception of the finding above quoted; for the reasons that such fact was conclusively proven by the evidence, and was admitted and uncontradicted, and the finding is material to the issue of the cases.

V.

The court erred in finding the following fact, which was requested by the plaintiff, to wit:

> "That said freight charges assessed plaintiff on the list of shipments hereinbefore set forth, same being the shipments involved in these causes, were and are unreasonable to the plaintiff and in violation of the Interstate Commerce Act of February 4, 1887, and the acts Congress amendatory thereto,"

which is contained in paragraph 4 of findings of fact requested by plaintiff in Cause No. L.–695, in paragraph 4 of findings of fact requested by plaintiff in Cause No. L.–696, and in paragraph 7 of findings of fact found by the court, for the reasons that there is no competent evidence to sustain such a finding, and the same is not supported by and is contrary to the evidence; no competent testimony whatever having been offered at the trial as to the

unreasonableness, or illegality in any other respect, of the freight charges assessed upon plaintiff's said shipments involved in said causes; it being affirmatively shown, by the admitted and uncontradicted evidence set forth in the agreed statement of facts, that the freight charges assessed upon plaintiff's said shipments were based upon rates which were just, [313] reasonable, and lawful, having in fact been less in amount than a rate which had previously been declared, by valid formal findings and formal order of the Interstate Commerce Commission (Traffic Bureau, etc., v. Director-General, et al., 62 I. C. C. 412), to be reasonable, just and lawful for application upon shipments of sugar of the character of the plaintiff's shipments, from points in California to Phoenix, Arizona, from and after the 17th day of September, 1921, and until the further order of said Commission, which said findings and order of said Commission had not, prior to said 10th day of February, 1925, been modified, revoked, or annulled, and were at all of said times, from and after said 17th day of September, 1921, and until and including said 10th day of February, 1925, valid and lawful, and in full and continuous force and effect.

VI.

The court erred in finding the following fact, which was requested by the plaintiff, to wit:

"That the just and reasonable freight rates which should have been charged on all of said shipments hereinbefore set forth from said

points of origin in California to said point of destination in Arizona after the first day of July, 1922, and up to and including the 10th day of February, 1925, was 73 cents per hundred pounds from Spreckels, Crockett and San Francisco, California, and 71 cents per hundred pounds from Oxnard and Betteravia, California,"

which is contained in paragraph 4 of findings of fact requested by plaintiff in Cause No. L.–695, and in paragraph 4 of findings of fact requested by plaintiff in Cause No. L.–696, and in paragraph 8 of findings of fact found by the court, for the reasons that said finding is not sustained or supported by any competent evidence, and is contrary to the evidence, in that it affirmatively appears from the stipulated and agreed statement of facts that the freight rates which were actually charged upon all of said shipments of the plaintiff involved in said causes were just, reasonable, and lawful, having in fact been less in amount than a rate which had previously been declared, by valid formal findings and formal order of the [314] Interstate Commerce Commission (Traffic Bureau, etc., v. Director-General, et al., 62 I. C. C. 412), to be reasonable, just and lawful for application upon shipments of sugar of the character of the plaintiff's shipments, from points in California to Phoenix, Arizona, from and after the 17th day of September, 1921, and until the further order of said Commission, which said findings and order of said Commission had

not, prior to said 10th day of February, 1925, been modified, revoked, or annulled, and were at all of said times, from and after said 17th day of September, 1921, and until and including said 10th day of February, 1925, valid and lawful, and in full and continuous force and effect.

VII.

The court erred in finding the following fact, which was requested by the plaintiff, to wit:

> "That the plaintiff did duly comply with all of the requirements of the Interstate Commerce Commission as to the proof necessary for the amount of said reparations,"

which is contained in paragraph 6 of findings of fact requested by plaintiff in Cause No. L.–695, and in paragraph 6 of findings of fact requested by plaintiff in Cause No. L.–696, and in paragraph 9 of findings of fact found by the court, for the reasons that the same is not sustained nor supported by competent evidence, and is contrary to the evidence and the law, there being no competent evidence whatsoever upon which to base said finding.

VIII.

The court erred in finding the following facts, which were requested by the plaintiff, to wit:

> "That by reason of said unreasonable rates and charges and payment thereof by the plaintiff and by reason of the refusal of the defendants to pay said reparations so awarded by the Interstate Commerce Commission, plaintiff is

damaged by the defendants, Atchison, Topeka and Santa Fe Railroad, Bay Transport Company, and Southern Pacific Company in the total amount of $3,751.61, together with interest thereon at the rate of 6 per cent per annum from the respective dates of payment, and plaintiff is damaged by the [315] defendants, Southern Pacific Company and Santa Maria Valley Railroad Company in the total sum of $3,484.33, together with interest thereon at the rate of 6 per cent per annum from the respective dates of payment,".

which are contained in paragraph 9 of findings of fact requested by the plaintiff in Cause No. L.–695, and paragraph 9 of findings of fact requested by the plaintiff in Cause No. L.–696, and in paragraph 11 of findings of fact found by the court, for the reasons that such findings are not supported nor sustained by the evidence, and are contrary to the evidence and the law, in that there is no competent evidence to show that any unreasonable rates and/or charges were ever collected by the defendants, or any of them, from the plaintiff, or paid by the plaintiff to the defendants or any of them, or that the defendants have ever refused to pay reparation properly and lawfully awarded by the Interstate Commerce Commission to the plaintiff, or that the plaintiff has ever been damaged by the collection of the rates and charges referred to in the complaints in said causes; the causes of action in each of said causes being based solely upon the theory that the Interstate Commerce Commission is possessed of

lawful jurisdiction to award reparation for the collection of charges based upon rates duly and lawfully published by the defendants, as carriers engaged in interstate commerce, in compliance and conformity with a lawful valid continuing formal order of said Commission prescribing the maximum reasonable future rate to be observed by said defendants; and the uncontradicted testimony shows that each and all of the rates applied upon each and all of the plaintiff's said shipments were in fact equal to, or less than, a rate so prescribed as a maximum reasonable rate for the future by a lawful valid continuing formal order of said Commission, in effect without modification at all of the times said shipments moved.

IX.

The court erred in finding the following facts, which were [316] requested by the plaintiff, to wit:

> "That the plaintiff was required to employ attorneys at law to prosecute the present actions, in order to effect collection of said reparations, and that 20 per cent of the total amount due including interest and principal in both of said causes is reasonable as attorneys' fees,"

which are contained in paragraph 10 of findings of fact requested by the plaintiff in each of said causes, and in paragraph 12 of findings of fact found by the court, for the reasons that such findings are not supported or sustained by the evidence, and are contrary to the evidence and the law, in

that said amount found by the court to be reasonable as attorneys' fees is so clearly and palpably too large, in view of the services rendered, as to amount to an abuse of the court's discretion.

X.

The court erred in failing to adopt the agreed statement of facts on file herein, without amendment, modification, or addition, as its findings of fact in said causes, and in making findings of fact herein which do not reproduce the statements of fact set forth in said agreed statement of facts, for the reason that no evidence whatever was introduced which in any way conflicts with, or modifies, said agreed statement of facts, or any part thereof, and the court's said failure to adopt said agreed statement of facts as its findings herein, and the making of findings of fact by the court not conforming to and reproducing said agreed statement of facts, are therefore contrary to the evidence and the law, and not supported by any competent evidence whatsoever.

XI.

The court erred in finding the following conclusions of law, which was requested by the plaintiff, to wit:

"That the order of the Interstate Commerce Commission, dated March 11, 1929, and made and entered in that certain proceeding before said Commission entitled Traffic Bureau of Phoenix Chamber of Commerce et al., vs. A. T. & S. F. Railroad Company, et al., Docket

No. [317] 16742, which order required said defendants to pay to the plaintiff herein certain sums of money, as set forth in said order and in plaintiff's complaint, was and is a legal, valid and binding order and was made and entered by said Interstate Commerce Commission in said cause, and was within the power and jurisdiction conferred upon said Interstate Commerce Commission by law, and that in the making of said order the said Interstate Commerce Commission acted within its jurisdiction and power,"

which is contained in paragraph 1 of conclusions of law requested by plaintiff in each of said causes, and in paragraph 1 of conclusions of law found by the court, for the reasons that such conclusion is not sustained or supported by competent evidence, and is contrary to the evidence and the law, in that the evidence shows without conflict that said order of the Interstate Commerce Commission, dated March 11, 1929, purports to require the defendants to pay reparation for the collection of charges based upon rates duly and lawfully published and assessed in conformity with a legal, valid continuing formal order of said Interstate Commerce Commission, wherein and whereby said Commission prescribed the rate to be observed for the future by said defendants as a maximum reasonable rate.

XII.

The court erred in finding the following conclu-

sion of law, which was requested by the plaintiff, to wit:

> "That the rates of 86½ cents and 84 cents per hundred pounds charged the plaintiff by the defendants between the 6th day of February, 1923, and the 10th day of February, 1925, on shipments of fifty car loads of sugar originating at San Francisco, Crockett, and Spreckels in the State of California, as shown on the list of shipments hereinbefore set forth, were, as found by the Interstate Commerce Commission in said proceeding unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds after July 1, 1922, up to and including the 10th day of February, 1925, and that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines was 73 cents per hundred pounds between said dates,"

which is contained in paragraph 2 of conclusions of law requested by the plaintiff in cause No. L.-695, and in paragraph 2 (A) of [318] conclusions of law found by the court, for the reasons that such conclusions are not sustained or supported by the evidence, and are contrary to the evidence and the law, upon the grounds hereinbefore assigned, particularly in connection with assignments of error Nos. V, VI, and XI.

XIII.

The court erred in finding the following conclu-

sions of law, which were requested by the plaintiff, to wit:

"That the rates of 86½ and 84 cents per hundred pounds charged the plaintiff by the defendants between the 21st day of February, 1923, and the 5th day of February, 1925, on shipments of thirty-two carloads of sugar originating at San Francisco, California, Crockett, California, Oxnard, California, and Betteravia, California, as shown on the list of shipments hereinbefore set forth, were as found by the Interstate Commerce Commission in said proceeding known as Docket #16742, unreasonable to the extent that they exceeded a rate and charge of 73 cents per hundred pounds on all of said shipments from Crockett, California, and San Francisco, California, to Phoenix, Arizona, after the date of July 1, 1922, and up to and including the 5th day of February, 1925; and 71 cents per hundred pounds on 11 of said shipments from Oxnard, California, and Betteravia, California, to Phoenix, Arizona, after the first day of July, 1922, and up to and including the 5th day of February, 1925;

"And that the reasonable rate which should have been charged the plaintiff on account of said shipments over defendants' lines during said dates was 73 cents per hundred pounds on all said shipments from Crockett, California, and San Francisco, California, to Phoenix, Arizona, and 71 cents per hundred pounds on

all shipments between said dates from Oxnard, California, and Betteravia, California,"

which is contained in paragraph 2 of conclusions of law requested by the plaintiff in cause No. L.-696, and in paragraph 2 (B) of conclusions of law found by the court, for the reasons that such conclusions are not sustained or supported by the evidence, and are contrary to the evidence and the law, upon the grounds hereinbefore assigned, particularly in connection with assignments of error Nos. V, VI, and XI.

XIV.

The court erred in finding the following conclusion of law, [319] which was requested by the plaintiff, to wit:

"That is cause No. L.-695 by reason of said unreasonable charges the plaintiff has been damaged and the defendants, and each of them, became and are jointly and severally indebted to the plaintiff in the sum of $3,751.61, principal, together with interest at the rate of six per cent per annum from the respective dates of payment of the charges as shown on the list of shipments hereinbefore set forth, amounting to the sum of $1,444.14, and attorneys' fees of 20 per cent of the total amount of said indebtedness, including principal and interest, amounting to the sum of $1,039.19, together with the other lawful costs incurred by plaintiff in said action, and that plaintiff is entitled to judgment therefor,"

which is contained in paragraph 3 of conclusions of law requested by the plaintiff in cause No. L.–695, and in paragraph 3 (A) of conclusions of law found by the court, for the reasons that such conclusions are not sustained or supported by the evidence, and are contrary to the evidence and the law, upon the grounds hereinbefore assigned, particularly in connection with assignments of error Nos. VIII and IX.

XV.

The court erred in finding the following conclusions of law, which were requested by the plaintiff, to wit:

> "That in cause No. L.–696 by reason of said unreasonable charges, the plaintiff has been damaged and the defendants and each of them, became and are jointly and severally indebted to the plaintiff in the sum of $2,464.33, together with interest at the rate of 6 per cent per annum from the respective dates of payment of the charges as shown on the list of shipments hereinbefore set forth, amounting to the sum of $933.91, and attorneys' fees of 20 per cent of the total amount of said indebtedness, including principal and interest, amounting to the sum of $675.60, together with the other costs incurred by plaintiff in said action and the plaintiff is entitled to judgment therefor,"

which is contained in paragraph 3 of conclusions of law requested by the plaintiff in cause No. L.–696, and in paragraph 3 (B) of conclusions of law

found by the court, for the reasons that such conclusions are not sustained or supported by the evidence, and are contrary to the evidence and the law, upon the grounds hereinbefore assigned, particularly in connection with assignments of [320] error Nos. VIII and IX.

XVI.

The court erred in rendering judgments upon the facts found in favor of the plaintiff and against the defendants, The Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, Santa Maria Valley Railroad Company, and Southern Pacific Company, and in refusing to render judgments for said defendants, in said causes, for the following reasons:

(1) The facts as found by the court are not sufficient to support the judgments in favor of the plaintiff, in that the judgments are based solely upon the theory that the Interstate Commerce Commission, on March 11, 1929, issued a lawful, valid and binding order directing said defendants to pay to the plaintiff certain sums, as reparation for the collection of alleged unreasonable charges upon carload shipments of sugar from points in California to Phoenix, Arizona, moving during the period between July 1, 1922, and February 10, 1925, both inclusive; whereas the uncontradicted testimony shows that the rates assessed and the charges collected by said defendants, and each of them, for the transportation of plaintiff's said shipments moving during said period were duly and regularly published and filed with the Interstate Commerce Commission, in conformity with lawful findings and

a lawful continuing order of said Commission theretofore duly made and entered, and which said findings and order were continuously in effect, and not revoked, modified or annulled, during all of said period, and up to and including said 10th day of February, 1925, and that the rates assessed and the charges collected upon each and all of the said shipments of the plaintiff were the lawful tariff rates and charges assessed and collected by virtue of, and under authority of, said continuing formal valid findings and order of said Commission; and said order of said Commission purporting to award reparation is therefore void and of no effect, because in excess of the jurisdiction conferred [321] by law and by the Interstate Commerce Act upon said Commission.

(2) If said Interstate Commerce Act is to be construed as authorizing said Commission to award reparation for the collection of rates and charges published, assessed and collected in accordance with, and conforming to, a valid continuing effective order previously issued by said Commission prescribing the maximum reasonable rate to be charged from and after the effective date thereof, said Interstate Commerce Act is to that extent invalid and unconstitutional, and any and all orders purporting to be issued in pursuance of said purported jurisdiction thereby conferred are likewise invalid and unconstitutional, because in contravention of the Fifth Amendment to the Constitution of the United States, and particularly those portions thereof which forbid the taking of property without due process of law.

XVII.

The court erred in rendering judgments upon the facts set forth in the agreed statement of facts and in the uncontradicted oral and documentary testimony supplementary to said agreed statement in favor of the plaintiff and against the defendants, The Atchison, Topeka & Santa Fe Railway Company, Bay Transport Company, Southern Pacific Company, and Santa Maria Valley Railroad Company; and in refusing to render judgments in favor of such defendants in said causes, for the reasons hereinbefore set forth, particularly in connection with assignment of error No. XVI.

XVIII.

The court erred in refusing to find the following conclusion of law, requested by defendants in paragraph 1 of their requested conclusions of law, to wit:

"That the rates and charges assessed and collected upon plaintiff's said shipments, as shown upon said list above set forth, were published and collected by authority of a formal and continuing order of the Interstate Commerce Commission, and had previously been established and declared by said Commission to be not unreasonable, after formal investigation and/or were [322] less in amount than rates which had been specifically prescribed and declared by said Commission to be not unreasonable after such formal investi-

for the reasons that such conclusion is established by the uncontradicted testimony, and conforms to and is justified and required by all of the evidence and the law, and is material to the issues in these cases.

XIX.

The court erred in refusing to find the following conclusions of law requested by the defendants in paragraph 2 of their requested conclusions of law, to wit:

"That said order of said Interstate Commerce Commission dated the 11th day of March, 1929, purporting to order and direct these defendants to pay reparation to the plaintiff with respect to its said shipments hereinbefore listed, is null and void and of no effect, because said Commission was and is without lawful jurisdiction and authority under the Interstate Commerce Act to make said order, for the following reasons:

(a) Said Interstate Commerce Act does not vest said Commission with jurisdiction and authority to award reparation with respect to charges collected upon the basis of rates which said Commission has theretofore specifically prescribed or approved as reasonable and just for the future by a formal continuing order, or with respect to charges collected upon the basis of rates which are less in amount than rates so prescribed and/or approved as just and reasonable.

(b) If said Act were so construed as to confer such jurisdiction and authority upon said Commission, it would to that extent be unconstitutional, and any and all orders made in pursuance of said purported jurisdiction would likewise be unconstitutional and void, because contrary to and forbidden by the Fifth Amendment to the United States Constitution, and particularly those portions of said Amendment which guarantee that no person shall be deprived of property without due process of law,"

for the reasons that said conclusions are, and each of them is, justified and required by the evidence, and in conformity with the controlling principles of law applicable in these cases, and is material to the issues in said cases.

XX.

The court erred in refusing to find the following conclusion of law requested by the defendants in paragraph 3 of their requested [323] conclusions of law to wit:

"That plaintiff has failed to establish by the evidence any cause of action whatever against the defendants, or any of them, and has failed to establish that any unreasonable or unlawful rate or charge was collected upon any of its said shipments, or that any reparation whatsoever is due or payable with respect to said shipments, or any of them,"

for the reasons hereinbefore assigned.

XXI.

The court erred in refusing to find the following conclusion of law requested by defendants in paragraph 4 of their requested conclusions of law, to wit:

> "That the plaintiff is not entitled to recover any amount whatsoever as and for fees of its attorneys and counsel in these causes,"

for the reason that there is no authority in law for the recovery of any judgment in any amount whatsoever against any of the defendants, and consequently there is no authority for the recovery of any fees of attorneys and counsel.

XXII.

The court erred in refusing to find the following conclusion of law which was requested by defendants in paragraph 5 of their requested conclusions of law, to wit:

> "That the defendants are entitled to judgment against the plaintiff, that the plaintiff take nothing by its causes of action, or either of them, and that the complaints herein be dismissed,"

for the reasons hereinbefore assigned, particularly in connection with assignments of error Nos. XVI and XVII.

WHEREFORE, the said defendants pray that the judgment of the District Court in both of the above causes may be reversed.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.
GERALD E. DUFFY,
JAMES E. LYONS,
A. BURTON MASON,
Of Counsel for Defendants.

Filed Sep. 23, 1930. [324]

[Title of Court and Cause—No. L.-695—Phoenix.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND.

On the 24th day of September, 1930, came the defendants by their attorneys and filed herein, and presented to the Court their petition for the allowance of an appeal, and assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the records, proceedings, and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that citation issue; and further praying that this Court fix the amount of the costs and/or supersedeas bond to be given by the defendants in this cause; and that such other and further proceedings may be had as may be proper in the premises,—

NOW, THEREFORE, on consideration thereof the Court does hereby allow the appeal as prayed for, and does hereby fix the amount of the costs and supersedeas bond in the sum of Seventy-five Hundred Dollars ($7500.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 24th day of September, 1930.

F. C. JACOBS,

Judge of the United States District Court for the District of Arizona. [325]

Endorsement on foregoing Order Allowing Appeal and Fixing Amount of Cost and/or Supersedeas Bond: Filed Sep. 29, 1930. [326]

[Title of Court and Cause—No. L.-696—Phoenix.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST AND/OR SUPERSEDEAS BOND.

On this 24th day of September, 1930, came the defendants by their attorneys and filed herein, and presented to the Court their petition for the allowance of an appeal, and assignments of error intended to be urged by them, praying also that a duly authenticated transcript of the records, proceedings, and all papers and documents upon which the judgment herein was rendered may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that citation issue; and further praying that this Court fix the amount of the costs and/or supersedeas bond to be given by the defendants in

this cause; and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, on consideration thereof the Court does hereby allow the appeal as prayed for, and does hereby fix the amount of the costs and supersedeas bond in the sum of Sixty-five Hundred Dollars ($6500.00), and does hereby order that such bond shall operate as a supersedeas bond.

Dated this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court for the District of Arizona. [327]

Endorsement on foregoing Order Allowing Appeal and Fixing Amount of Cost and/or Supersedeas Bond: Filed Sep. 29, 1930. [328]

[Title of Court and Cause—No. L.-695—Phoenix.]

[Seal of Southern Pacific Company]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That The Atchison Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, as principals, and Pacific Indemnity Company of California, a corporation, as surety, are held and firmly bound unto Arizona Grocery Company, a corporation, plaintiff in the above-entitled action in the full and just sum of Seventy-five Hundred ($7500.00) Dollars, to be paid to said Ariz-

ona Grocery Company, its successors or assigns; for the payment of which sum well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and sealed this 24th day of September, 1930.

The condition of this obligation is such that whereas a certain judgment and decision in the above-entitled cause was rendered in favor of said plaintiff, Arizona Grocery Company, a corporation, and against said defendants, The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation and Southern Pacific [329] Company, a corporation, on or about the 15th day of July, 1930, by the Honorable F. C. Jacobs, presiding Judge of the above-entitled cause and court, and whereas, the said defendants, The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, after the entry and filing of said judgment duly filed and presented to the above-entitled court their petition, praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, for the purpose of reversing said judgment, and said appeal was allowed by the said Honorable F. C. Jacobs, presiding Judge of the United States District Court for the District of Arizona, upon the said defendants giving bond, according to law in the sum of Seventy-five Hundred

($7500.00) Dollars, which said bond shall operate as a supersedeas bond.

NOW, THEREFORE, if the said The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, defendants above named, shall prosecute their said appeal to effect and shall pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise it shall remain in full force and effect.

And the said surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond the United States District Court for the District of Arizona may, upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and [330] to order execution therefor.

IN WITNESS WHEREOF, the undersigned have executed this bond this said 24th day of September, 1930.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation.

By W. H. BRENNER,

Its Assistant to General Manager.

[Corporate Seal]

Attest: S. A. FORRESTER,
Its Deputy Asst. Secretary.

BAY TRANSPORT COMPANY, a Corporation.

By V. CLUEGOMT,
Its President.

[Corporate Seal]

Attest: W. C. McDONALD,
Its Secretary.

SOUTHERN PACIFIC COMPANY, a Corporation.

By F. S. McGINNIS,
Its Vice-President.

[Corporate Seal] Attest: G. S. KING,
Principals.

PACIFIC INDEMNITY COMPANY.

By L. G. BLAKE,
Attorney-in-fact.

[Seal] Countersigned: MABEL FETTER,
Attorney-in-fact,
Surety.

The above bond and surey approved this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court for the District of Arizona.

Filed Sep. 29, 1930. [331]

[Title of Court and Cause—No. L.-696—Phoenix.]

[Seal of Southern Pacific Company.]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, as principals, and Pacific Indemnity Company of California, a corporation, as surety, are held and firmly bound unto Arizona Grocery Company, a corporation, plaintiff in the above-entitled action, in the full and just sum of Sixty-five Hundred ($6500.00) Dollars, to be paid to said Arizona Grocery Company, its successors or assigns; for the payment of which sum well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and sealed this 24th day of September, 1930.

The condition of this obligation is such that whereas a certain judgment and decision in the above-entitled cause was rendered in favor of said plaintiff, Arizona Grocery Company, a corporation, and against said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, on or about the 15th day of July, 1930, by the Honorable F. C. Jacobs, presiding Judge of the above-entitled [332] cause and court, and whereas, the said defendants, Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corpora-

tion, after the entry and filing of said judgment duly filed and presented to the above-entitled court their petition, praying for the allowance of an appeal for the review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, for the purpose of reversing said judgment, and said appeal was allowed by the said Honorable F. C. Jacobs, presiding Judge of the United States District Court for the District of Arizona, upon the said defendants giving bond, according to law, in the sum of Sixty-five Hundred ($6,500.00) Dollars, which said bond shall operate as a supersedeas bond.

NOW, THEREFORE, if the said Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, defendants above named, shall prosecute their said appeal to effect and shall pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise it shall remain in full force and effect.

And the said surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond the United States District Court for the District of Arizona may, upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and [333] to order execution therefor.

IN WITNESS WHEREOF, the undersigned have executed this bond this said 24th day of September, 1930.

SOUTHERN PACIFIC COMPANY, a Corporation.

By F. S. McGINNIS,
Its Vice-President.

[Corporate Seal] Attest: G. S. KING,
Its Assistant Secretary.

SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation.

By RAYMOND W. STEPHENS,
Its Vice-President.

[Corporate Seal] Attest: E. A. OLSON,
Its Secretary.

Principals.

PACIFIC INDEMNITY COMPANY.

By L. G. BLAKE,
Attorney-in-fact.

[Seal] Countersigned:

By MABEL FETTER,
Attorney-in-fact,
Surety.

The above bond and surety approved this 24th day of September, 1930.

F. C. JACOBS,
Judge of the United States District Court for the District of Arizona.

Filed Sep. 29, 1930. [334]

[Title of Court and Cause—Nos. L.-695—L.-696—Phoenix.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court, and to Messrs. Elliott & Snell, Attorneys for Plaintiff and Appellee:

You, and each of you, are hereby notified that defendants and appellants require that the transcript of record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, with the appeals heretofore filed and allowed in the above causes, shall contain properly certified copies of the following papers, proceedings and documents, which defendants and appellants aver to be necessary to a determination of the cause in the appellate [335] court, to wit:

1. All summons and returns in each of the above causes.
2. The complaints in each of the above causes.
3. The demurrers in each of the above causes.
4. The answers in each of the above causes.
5. The agreed statement of facts.
6. The stipulations waiving jury and consolidating the causes for trial, filed in each of the above cases.
7. The request for special findings of fact by the court filed in each of the above causes.
8. The stipulation for procedure filed in the case on January 8, 1930.
9. All minute entries of the Clerk.

10. Plaintiff's Exhibits "A," "B," and "C."

11. Plaintiff's proposed and requested findings of fact and conclusions of law filed in each case.

12. Defendants' exceptions and objections to findings of fact and conclusions of law requested by plaintiff.

13. The findings of fact and conclusions of law requested by the defendants.

14. Stipulation for consolidation of record.

15. Order for consolidation of record.

16. The final findings of fact and conclusions of law found by the Court.

17. The judgments in each case.

18. Plaintiff's notice of application to tax costs with attached statement of costs in each case.

19. Defendants' objections and exceptions to plaintiff's statement of costs in each case.

20. The bill of exceptions.

21. Petitions for appeal filed in each case. [336]

22. Assignments of error, filed in each case.

23. Order allowing appeal and fixing amount of cost and/or supersedeas bond, filed in each case.

24. Supersedeas and appeal bond, and approval, filed in each case.

25. Citations on appeal filed in each case.

26. This praecipe.

27. Clerk's certificate.

Dated, this 29th day of September, 1929.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
J. E. LYONS,
A. B. MASON,
GERALD E. DUFFY,
Attorneys for Defendants and Appellants.

Service of the within praecipe for transcript of record and receipt of copy thereof is hereby admitted on this 29th day of September, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiff and Appellee.

Filed Sep. 29, 1930. [337]

[Title of Court.]

United States of America,
District of Arizona,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, C. R. McFall, Clerk of the District Court of the United States, for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of Arizona Grocery Company, a Corporation, Plaintiff, vs. The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Bay Transport Company, a Corporation, and Southern Pacific Company, a Corporation, Defendants, numbered L.-695—Phoenix, on the docket of said court, and in the case of Arizona

Grocery Company, a Corporation, Plaintiff, vs. Southern Pacific Company, a Corporation, and Santa Maria Valley Railroad Company, a Corporation, Defendants, on the docket of said court.

I further certify that the attached pages, numbered 1 to 344, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the city of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $59.60 and that said sum has been paid to me by counsel for the appellants.

I further certify that the original citations issued in the said causes are hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 17th day of October, 1930.

[Seal]

C. R. McFALL,
Clerk.
By J. Lee Baker.
J. Lee Baker,
Chief Deputy Clerk. [338]

[Title of Court and Cause—No. L.-695—Phoenix.]

CITATION ON APPEAL.

To Arizona Grocery Company, a Corporation, Plaintiff Above Named, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an appeal, and/or order allowing appeal filed in the Clerk's office of the United States District Court for the District of Arizona, wherein The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said The Atchison, Topeka & Santa Fe Railway Company, a corporation, Bay Transport Company, a corporation, and Southern Pacific Company, a corporation, appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. [339]

WITNESS the Hon. F. C. JACOBS, Judge of the United States District Court, for the District of Arizona, this 24th day of September, 1930.

[Seal] F. C. JACOBS,
Judge of the United States District Court, for the District of Arizona.

Service of the within citation on appeal, and receipt of a copy thereof is hereby admitted this 29th day of September, 1930.

Service is also admitted as of this date and receipt of copies of petition for appeal, ordered allowing appeal, and fixing amount of cost and/or supersedeas bond, assignments of error, and bond, all having to do with the above entitled and numbered cause.

ELLIOTT & SNELL,
Attorneys for Arizona Grocery Company,
Plaintiff and Appellee. [340]

[Endorsed]: Filed Sep. 29, 1930. [341]

[Title of Court and Cause—No. L.-696—Phoenix.]

CITATION ON APPEAL.

To Arizona Grocery Company, a Corporation, Plaintiff Above Named, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an appeal, and/or order allowing appeal filed in the Clerk's office of the United States District Court, for the District of Arizona, wherein Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, are appellants and you are appellee, to show cause, if any there

be, why the judgment rendered against the said Southern Pacific Company, a corporation, and Santa Maria Valley Railroad Company, a corporation, appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. F. C. JACOBS, Judge of the United States [342] District Court, for the District of Arizona, this 24th day of September, 1930.

[Seal] F. C. JACOBS,
Judge of the United States District Court, for the District of Arizona.

Service of the within citation on appeal, and receipt of a copy thereof is hereby admitted this 29th day of September, 1930.

Service is also admitted as of this date and receipt of copies of petition for appeal, order allowing appeal and fixing amount of cost and/or supersedeas bond, assignments of error, and bond, all having to do with the above entitled and numbered cause.

ELLIOTT & SNELL,
Attorneys for Arizona Grocery Company,
Plaintiff and Appellee. [343]

[Endorsed]: Filed Sep. 29, 1930. [344]

[Endorsed]: No. 6284. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Bay Transport Company, a Corpora-

tion, and Southern Pacific Company, a Corporation, Appellants, vs. Arizona Grocery Company, a Corporation, Appellee, and Southern Pacific Company, a Corporation, and Santa Maria Valley Railroad Company, a Corporation, Appellants, vs. Arizona Grocery Company, a Corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Arizona.

Filed October 20, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Defendants and Appellants,
vs.
ARIZONA GROCERY COMPANY,
Plaintiff and Appellee.

SOUTHERN PACIFIC COMPANY et al.,
Defendants and Appellants,
vs.
ARIZONA GROCERY COMPANY,
Plaintiff and Appellee.

STATEMENT OF APPELLANTS OF PARTS OF RECORD NECESSARY TO BE PRINTED.

To Honorable PAUL P. O'BRIEN, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to Messrs. ELLIOTT & SNELL, Attorneys for Plaintiff and Appellee:

I.

Defendants and appellants herein state that in the review of the above causes by the United States Circuit Court of Appeals for the Ninth Circuit they intend to rely upon alleged errors committed by the trial court as follows, to wit:

1. Errors of the trial court in its findings of fact and conclusions of law.
2. Errors of the trial court in refusing to make findings of fact and conclusions of law requested by the appellants and defendants.
3. Errors of the trial court in rendering judgments in favor of the plaintiff and appellee, and against the defendants and appellants.

II.

The defendants and appellants also state that for the proper consideration of said alleged errors they think it necessary to print the following parts and portions of the transcript of record certified and filed by the Clerk of the United States District Court with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

All of said transcript of record save and except the agreed statement of facts appearing upon pages 52 to 90, both inclusive, of said transcript; and save and except Plaintiff's Exhibits Nos. "A," "B," and "C," appearing upon pages 97 to 102, both inclusive, of said transcript; and save and except the final findings of fact and conclusions of law found by the Court appearing upon pages 188 to 201, both inclusive, of said transcript.

Dated at Phoenix, Arizona, this 16th day of October, 1930.

BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
JAMES E. LYONS,
A. BURTON MASON,
GERALD E. DUFFY,
Attorneys for Defendants and Appellants.

Service of the within statement of appellants of parts of record necessary to be printed is admitted this 16th day of October, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Statement of Appellants of Parts of Record Necessary to be Printed. Filed Oct. 20, 1930. Paul P. O'Brien, Clerk.

In the District Court of the United States in and for the District of Arizona.

No. L.–695—PHOENIX.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,

Defendants.

No. L.–696—PHOENIX.

ARIZONA GROCERY COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY et al.,

Defendants.

STIPULATION RESPECTING RECORD ON APPEAL.

It appearing that pages 137, 144, 145 and 156 of the Consolidated Record in the above-entitled causes heretofore transmitted by the Clerk of the above-entitled court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, are incorrect in certain respects:

IT IS HEREBY STIPULATED AND AGREED that the pages annexed to this stipulation and numbered respectively 137, 144, 145 and

156, are true and correct copies of said pages, so numbered, as the same appear from the original record on file in the office of the Clerk of said District Court, and may be substituted in the copy of said record heretofore transmitted, as aforesaid, in place of the pages thereof respectively identified by said numbers.

Dated October 23, 1930.

ELLIOTT & SNELL,
Attorneys for Plaintiffs.
BAKER & WHITNEY,
CHALMERS, FENNEMORE & NAIRN,
Attorneys for Defendants.

6. On the 22d day of June, 1921, in a proceeding before the Interstate Commerce Commission known as Docket 11532, entitled "Traffic Bureau, Phoenix Chamber of Commerce, et al., complainants, v. Director General et al., defendants" (to which proceeding Arizona Grocery Company, a copartnership, predecessor in interest of the plaintiff herein, was a party complainant) upon a complaint alleging that the rates on sugar in carloads from points in California (including all points in said state referred to in said list of shipments hereinbefore set forth) to Phoenix had been, were, and in the future would be unreasonable in violation of the Interstate Commerce Act, said Commission after due hearing and investigation duly made and rendered its opinion and order in said proceeding dated June 22d, 1921, which said opinion is reported in Volume 62, I. C. C. Reports, at pages 412 and following. Said report and order were and are as follows: [137]

Thereafter the defendants in said proceeding before said Commission, including the defendants in these causes and their connecting carriers, duly and regularly filed and published their tariffs effective September 17, 1921, complying with the Commission's order in said Docket No. 11,532, and naming a rate of 96 cents per hundred pounds on sugar, in carloads, from points in California to Phoenix, Arizona, which said rate was one-half cent less than the rate of 96½ cents per hundred pounds found not unreasonable for the future by said Commission in said Docket No. 11,532.

Said rate of 96 cents per 100 pounds remained in effect until on or about July 1, 1922, upon which date, in accordance with the recommendations made by said Commission in a report in a proceeding known as Docket 13,293, Reduced Rates 1922, reported in Volume 68, I. C. C. Reports, at pages 676 and following, said rate of 96 cents was voluntarily reduced to 86½ cents per hundred pounds; said last-mentioned rate of 86½ cents per hundred pounds was named in tariffs of said defendants herein, and of other carrier engaged in interstate commerce, and was duly and regularly filed with the Interstate Commerce Commission in accordance with law.

Said last-mentioned rate of 86½ cents per hundred pounds remained in effect until on or about January 10, 1924, upon which date the same was voluntarily reduced to 84 cents per hundred pounds; said last-mentioned rate of 84 cents was duly and regularly established by these defendants and by

other common carriers engaged in interstate commerce, and was named in tariffs duly and regularly filed in accordance with law.

Said rates of 86½ cents per hundred pounds and 84 cents per hundred pounds were the rates which were successively in effect, and assessed upon complainant's shipments during the period of [144]

movement thereof. Said rates are the rates referred to "as charged" upon said list of shipments hereinbefore set forth.

7. Said last-mentioned rate of 84 cents per hundred pounds remained in effect until February 25, 1925, upon which date the same was reduced to 71 cents per 100 pounds, pursuant to and in compliance with certain findings and orders made by said Commission in a proceeding known as Docket No. 14,449, reported in Volume 95, I. C. C. Reports, at pages 244 and following, in which proceeding the Traffic Bureau of the Phoenix Chamber of Commerce, and certain others including the plaintiff, were complainants, and in which proceedings said complainants alleged that the rates on sugar from points in California, including the points of origin of the shipments of plaintiff herein, to Phoenix, Arizona, had been, were, and in the future would be, unreasonable. Said report and order of said Commission in said proceeding, Docket No. 14449, were and are as follows: [145]

and were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said proceeding to have been reasonable; and that said complainants were entitled to reparation, with interest. Said report and order of said Commission in said Docket No. 16,742, were and are as follows: [156]

[Endorsed]: Filed Oct. 23, 1930. C. R. McFall, Clerk, United States District Court for the District of Arizona. By H. F. Schlittler, Deputy Clerk.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District court in and *or* the District of Arizona, do hereby certify that the annexed and foregoing is a true and full copy of the original Stipulation Respecting Record on Appeal, filed on October 23, 1930, in cases numbered L.-695—Phoenix and L.-696—Phoenix, Arizona Grocery Company vs. Atchison, Topeka & Santa Fe Railway Company and Southern Pacific Company, a Corporation, now remaining among the records of the court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Phoenix, this 23d day of October, A. D. 1930.

[Seal]

C. R. McFALL,
Clerk.
By H. F. Schlittler.
H. F. Schlittler,
Deputy Clerk.

[Endorsed]: Filed Oct. 25, 1930. Paul P. O'Brien, Clerk.

No. 6284

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Appellants,

vs.

ARIZONA GROCERY COMPANY, a Corporation,

Appellee.

and

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Appellants,

vs.

ARIZONA GROCERY COMPANY, a Corporation,

Appellee.

Upon Appeals from the District Court of the United States for the District of Arizona.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirteenth day of February, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeals in above cause argued by Mr. A. Burton Mason, counsel for the appellants, and by Mr. Frank L. Snell, Jr., counsel for appellees, and submitted to the Court for consideration and decision, with leave to counsel for appellants to file a reply brief within fifteen (15) days from date.

At a stated term, to wit, the October term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-third day of March, in the year of our Lord one thousand nine hundred and

thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Arizona.

Before RUDKIN, WILBUR and SAWTELLE, Circuit Judges.

WILBUR, Circuit Judge.—This is an appeal from the judgment of the District Court enforcing a reparation order of the Interstate Commerce Commission. The reparation order was made in a proceeding before the Interstate Commerce Commission entitled Traffic Bureau of Phoenix Chamber of

Commerce et al. vs. The Atchison, Topeka & Santa Fe Railway Company, No. 16,742. The record of the decision is found in the reports of the Interstate Commerce Commission (140 I. C. C. 171). The Interstate Commerce Commission in this proceeding declared the existing rate charged by the railway company to be unreasonable and unjust, fixed a future rate which it declared to be reasonable and just upon shipments of sugar in carload lots of 73 cents per 100 pounds from all points in Northern California, and 71 cents per 100 from points in Southern California, to Phoenix, Arizona. It declared the existing rates charged by the carriers to be unreasonable and unjust and awarded reparations in the amount subsequently incorporated in the judgment of the District Court, from which the railroad companies, hereinafter designated as appellants, take this appeal. No attack is made on this appeal as to the reasonableness of freight rates fixed in the order of the Interstate Commerce Commission for the future. Nor is it denied that the law authorizes the Interstate Commerce Commission, upon declaring a freight rate unreasonable and unjust, to order reparations in favor of shippers damaged by reason of the excessive rates previously charged them. Appellants' attack upon the order of the Interstate Commerce Commission awarding reparations, and upon the judgment of the District Court enforcing such reparations, is based upon the claim that the rates charged by them previous to the order of the Interstate Commerce Commission were Commission-made rates, and that while the

Commission would have a right to award reparations as against an unjust or unreasonable rate fixed by the carrier, it had no power to award reparations upon finding that a rate fixed by the Commission was excessive, for the reason that such rates were conclusively presumed to be just and reasonable until changed by the Commission, and that such change must be prospective and not retrospective. Before discussion of the points raised by the appellants, and the answers thereto by appellee, further facts with relation to the controversy should be stated.

The above-mentioned decision of the Interstate Commerce Commission (140 I. C. C. 171) was the third in a series of decisions by the Commission dealing with the freight rates on sugar transported from California to Arizona points over the Atchison, Topeka & Santa Fe Railway Company's lines, and also those of the Southern Pacific Company. These cases are referred to in the briefs as the first, second and third case.

In the first case, entitled Traffic Bureau of Phoenix Chamber of Commerce vs. Director General et al. (62 I. C. C. 412), the Commission, on June 22, 1921, fixed the freight rate on sugar from all points in California to Phoenix, Arizona, at not exceeding 96½ cents. In view of the importance of the findings and order of the Interstate Commerce Commission in the first case we quote a portion of the opinion as follows:

> "We find that the rates attacked were, are, and for the future will be, unreasonable to the

extent that they exceeded, exceed, or may exceed 96.5 cents."

In pursuance of this finding an order was entered June 22, 1921, prohibiting the carriers from publishing or collecting their present rates for the transportation of sugar in carload lots from California points to Phoenix, Arizona, and it was further ordered:

> "That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 17, 1921, upon notice to this Commission and to the general public, by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of sugar in carloads from California points to Phoenix, Ariz., rates which shall not exceed 96.5 cents per 100 pounds. It is further ordered that this order shall continue in force until the further order of the Commission."

In pursuance of this order the carriers established a rate, effective September 17, 1921, of 96 cents per 100 pounds. On July 1, 1922, they reduced this rate 10 per cent in conformity with the recommendation of the Interstate Commerce Commission in its opinion entitled *Reduced Rates 1922* (68 I. C. C. 676). The rate for sugar in carload lots from California points to Phoenix was thus fixed at 86.5 cents. On January 10, 1924, by voluntary order

of the carriers, they fixed a new tariff rate of 84 cents. This change to the 84-cent rate was due to the change of the main line rates owing to the withdrawal of long and short haul relief asked for by the carriers from the Interstate Commerce Commission. Phoenix, although on a branch line, was given the benefit of the readjustment along the main line of the Southern Pacific. The shipments of sugar involved in this proceeding were transported between February 21, 1923, and February 10, 1925, during the period when the rates fixed by the carriers was either 86.5 or 84 cents per 100 pounds.

In Traffic Bureau Phoenix Chamber of Commerce vs. A., T. & S. F., 95 I. C. C. 244, decided January 6, 1925, the Interstate Commerce Commission fixed the rate on sugar from California points to Phoenix at not exceeding 71 cents per 100 pounds. It also decided that the complainants were entitled to reparations upon past shipments to the extent that charges theretofore paid by them exceeded the new rate. The order in pursuance of the findings in the second case was substantially in the phraseology of the order of the first case. The carriers were directed to cease collecting their present rates and to establish, before February 25, 1925, new rates "from all points in California to Phoenix, Arizona, rates which shall not exceed 71 cents per 100 pounds, minimum 60,000 pounds." It is also provided that the order shall continue in force until the further order of the Commission.

No order for the payment of reparations was made

in the second case. The case was subsequently consolidated with the third case, wherein the rates were fixed at 73 cents from Northern California and 71 cents from Southern California to Phoenix, as aforesaid. Reparations were finally ordered upon the basis of the findings in the third case and the period covered by the reparations ordered and involved in this decision, as already pointed out, is between the 21st day of February, 1923, and the 10th of February, 1925. That is to say, is within the period between the 21st of January, 1923, and the effective date of the order in the second case. The petition for relief in the second case having been filed on November 3, 1922, the period in which reparation is involved was subsequent to the inception of the proceedings in the second case and prior to the effective date of the order rendered in the case.

Appellee's answer to the contention of the appellants is that the order of the Commission in the first case, fixing a maximum rate of 96.5 cents, was not a fixing of a just and reasonable rate, but that it was the duty of the carrier by its published tariffs to fix a rate which was just and reasonable, not exceeding the maximum rate fixed by the Commission. Therefore, it is claimed the rate attacked in the subsequent proceeding before the Interstate Commerce Commission was not a rate fixed by that Commission, but one fixed by the carrier, and if the rate so fixed by the carrier was in fact unjust and unreasonable, the Commission in the subsequent case had a right to declare the rate charged by the carrier to be unjust and unreasonable and order reparations

for the excessive charges of the past as well as to fix a rate for the future which it deemed to be just and reasonable. It is also contended, as we understand it, that even if the decision of the Commission in the first case is held to be a fixing of a just and reasonable rate, nevertheless the rate thus established for the future was established in the exercise of the *quasi*-legislative power of the Commission and is not *res judicata*, and that upon the complaint of a shipper claiming to be damaged by the rates charged by the carriers, the Commission, acting in a *quasi*-judicial capacity, can review its action theretofore taken in its *quasi*-legislative capacity, can determine that the findings so made by it in its *quasi*-legislative capacity were erroneous, the rate established unreasonable and unjust, and render judgment in favor of the shipper for the difference between the rate as found by the Commission in its *quasi*-legislative capacity and the rate found by it in its *quasi*-judicial capacity to be reasonable and just. In this connection it may be of assistance to state the position of the Interstate Commerce Commission as disclosed by its opinion in the third case:

> "Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. Goss vs. Director General, 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters

directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable, and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges."

It will be observed that the power of the Commission, as stated in the portion of the opinion just quoted, is not based upon the theory that the rate established in the previous order was anything other than what was then declared to be a just and reasonable rate. In other words, no distinction such as is claimed by the appellee was made by the Commission. It assumed in its opinion that the rate theretofore established by it, under the evidence then before the Commission, was determined by them to be a just and reasonable rate, but the Commission concluded that with more ample evidence, and after a more extensive investigation, its first decision was

erroneous. It therefore redetermined the question of the reasonableness of the rate as fixed in its previous order as a just and reasonable rate and decided that the carriers, in exacting the rate thus fixed by the Commission, had exacted an excessive and unreasonable and unjust rate and for that reason must reimburse the shippers from whom the rates were exacted. So far as the opinion of the Commission is concerned, no distinction is made between its power to fix rates which are just and reasonable and its power to fix maximum rates. As this is one of the basic questions in the case at bar, we pause here to say that we are in accord with the apparent conclusion of the Commission that its order fixing a maximum rate was in legal effect a determination by the Commission in its administrative or *quasi*-legislative capacity of a reasonable and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established and that the order of the Commission amounted to a decision that rates fixed by the carrier below the maximum it had established were just and reasonable. It would be absurd, it seems to us, to say that the Commission was empowered to prohibit the further collection of a freight rate established by the carrier on the ground that it was unjust and unreasonable and to replace that rate with another rate which was also unjust and unreasonable, that is, not just and not reasonable. The statute does not authorize or suggest the imposition of tentative rates pending an investigation or of

rates *pendente lite* in an investigation. Its power in the first place is to declare a rate unreasonable and unjust, and having so declared to replace it with a rate which is reasonable and just. It should be stated at this juncture that the contention of the appellee is based upon the language of section 15, subdivision 1, with relation to the fixing of rates for the future. This subdivision of section 15 is a very long and complex sentence. It contains the following phrase:

> " * * * the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt

the classification and shall conform to and observe the regulation or practice so prescribed."

The appellee places the phrase, "or the maximum or minimum, or maximum and minimum, to be charged" in opposition to the individual rate to be prescribed as just and reasonable. We think the phrase "just and reasonable" applies throughout the whole portion of the sentence involved in rate making, and therefore applies to the maximum or minimum or to the maximum and minimum, as the case may be. Otherwise, it would be absurd to provide that the carrier should thereafter be compelled to conform to the order of the Commission. The whole purpose of the act was to create and compel the enforcement without discrimination of rates which were just and reasonable. In our opinion the provisions in regard to the maximum or minimum rate were largely for the convenience of the Commission in dealing with the extremely intricate question of freight rates. In the case at bar freight rates were involved from a number of California points to a number of Arizona points. The Commission did not undertake to fix the rates from each separate point in California to each separate point in Arizona, and made a blanket order fixing a maximum rate, and not only authorized but directed the carrier to establish its rates within that maximum. In so doing it was incumbent upon the carrier to conform to certain principles in rate-making, including, perhaps, the principle of long and short haul. In this connection it should be observed that when the Hepburn Act was passed, in

1906, section 15, with regard to the fixing of future rates, authorized the Commission "to determine and prescribe what would be just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed"; and to provide that the carrier should not thereafter collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed. This act was amended by the Mann-Elkins Act, July 18, 1910, by extending the clause to cover individual or joint rates, as follows:

> " * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. * * * "

It was thus evidently contemplated by Congress that the Commission would not fix a particular rate to the exact cents to be collected by the carrier, but should in every case fix a rate which is the maximum rate which the carrier can charge. This was the legislative method pointed out by Congress to the Commission for fixing by it of freight rates. It is true that the language of the subsequent amendment now in force and hereinabove quoted, taken alone and without considering the cardinal purpose of the act, might lead to the conclusion that the Commission might either fix a just and reasonable rate or a maximum rate, but in view of the history of the legislation and its cardinal purpose it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate. In this connection it should be observed that in the numerous decisions by the courts considering the question of freight rates before the enactment of section 15 in its present form (February 28, 1920, 41 Stat. 484) the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable. No other thought has apparently entered the mind of the judges who are so frequently called upon to pass upon the power of the Commission under the Hepburn Act and the amendments thereto. C., R. I. & P. Ry. Co. vs. U. S., (1925) 6 Fed. (2d) 888; Houston Cotton Exch. vs. A. & A. R. R. Corp., (1924) 87 I. C. C. 392, 93 I. C. C. 268; C., R. I. & P. Ry. Co. vs. U. S., (1927) 274 U. S. 29, 71 L. Ed. 911; Montrose Oil Ref. Co. vs. St. L.-S. F. Ry., (1927) 25 F. (2d) 750; s. c., (1923) 78 I. C. C.

572; (1924) 95 I. C. C. 96; Mellon vs. World Pub. Co., (1927) 20 F. (2d) 613; World Pub. Co. vs. Director General, (1919) 53 I. C. C. 491.

It is clear that a blanket order fixing a maximum rate from a state as large as California to an adjoining state might result in individual rates that would be in fact unreasonable and unjust. For instance, if a sugar factory were established on the west bank of the Colorado river it would be unreasonable, no doubt, to charge the maximum rate for transporting sugar across the river to Yuma, Arizona, but the Commission was bound to consider such a possibility in fixing its maximum rate, and no doubt did so. If new conditions arose later which rendered rates fixed by the carrier unreasonable, the shipper affected could ask for the establishment of a new rate. The Commission could then reexamine the situation and establish a new rate, but there is no reason why an allowance of reparations should be made. The shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered.

The contention is that the Commission could revise its original findings as to what was in fact a reasonable rate because in the first instance it acted as a law-making body—a legislature—and in the second it acted in a judicial capacity—as a court. Let it be granted that the Commission in awarding reparations acted judicially, as has been so often said (Baer Bros. vs. Denver & R. G. R. R., 233 U. S. 479; Great N. Ry. vs. Merchants Elec. Co.,

259 U. S. 285, 291); let it be granted, also, that in fixing a reasonable rate for past transactions as a basis for its award of reparations it also acted judicially, as has also sometimes been said (Great No. Ry. vs. Merchants Elec. Co., *supra*). What follows? Is it not true that a court is bound in its determination by the law? Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (sec. 16, subd. 1), delegating power to the Commission to award reparations, limits that power to parties "entitled to an award of damages under the provisions of this chapter [act] *for a violation thereof* * * * " (Italics ours.) See, also, Transportation Act, sec. 10, subd. 8.) Is the court (the Commission in its *quasi*-judicial capacity) to say that a carrier has no lawful right to collect a rate established by law (that fixed by the Commission acting in its *quasi*-legislative capacity), or, having collected it, to retain it? It is true that the original order is not *res judicata,* but its effect is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the legislature.

These considerations point to a clear distinction between Commission-made rates, that is, legislative rates, and those established by the carrier. In the latter case, however, we have also a legislative declaration by Congress that all rates established by the carrier must be just and reasonable (Transporta-

tion Act, sec. 1, subds. 4, 5) and declaring that all rates which are "unjust and unreasonable" are "prohibited" and "unlawful." It may be said in a broad sense that Congress itself by this enactment has fixed "just and reasonable rates" as those allowed to be charged and collected and has permitted the carrier in the exercise of its business responsibilities to tentatively ascertain and fix such reasonable rates, subject to supervision and revision by the Commission in case of error. The carrier who fixes and charges excessive rates does so with the knowledge that its judgment is to be revised, and reparations awarded, if necessary to reduce such rates to what is just and reasonable. It is permitted to judge its own case in the first instance in fixing its rates, but does so in view of and because of such power of supervision and reparation in the Commission. When, however, in regularly pursuing its delegated power, the Commission establishes a specific rate as reasonable in fact, the legislative power has so definitely established the specific rate thus fixed as just and reasonable that there is no longer room for judicial decision as to what is a just and reasonable rate. Congress, through its agent, the Commission, has established the measure by which the reasonableness of the rate is to be judged. In considering an application for damages for charging unreasonable rates a court, or the Commission acting as such, must confine its inquiry to the other factors involved in an award of reparations, such as the amount of freight moved, the point of origin and of delivery, the owner of the shipment, etc., but

if there is no excess charge there can be no award, for where the rate is one fixed by law it is not excessive in any legal sense. Indeed, although the appellee insists that the fixing of rates as a basis of reparation for past shipments is a judicial or *quasi*-judicial act, it would be better, perhaps, for its position if the act were legislative, for a legislative body, unlike a court, can establish the law retroactively unless prevented by constitutional limitations. The fixing of a past rate by the Commission for purposes of awarding reparations certainly has some of the attributes of a legislative act, notably that it is of universal application to all past transactions, whether the shippers are parties to the proceedings or not. It is binding upon both the carrier and its shippers, and this because any other rule would destroy uniformity, which the act endeavors to establish and maintain. (See discussion in Mitchell Coal Co. vs. Penna. R. R. Co., 230 U. S. 247, 258, 259, 264, 265.) If the second fixing or refixing of the rate by the Commission as a basis for reparations is legislative, the only limits upon a retroactive act, other than the Constitution, would be the limitations of the Transportation Act defining the powers delegated to the Commission. The only constitutional restriction upon the legislative power to retroactively reduce rates suggested by the appellant is the constitutional prohibition against the taking of property without due process of law. That is, it is argued, the Commission, having established a legal and lawful rate, the freight charges thus fixed, allowed and collected become the property of

the carrier and cannot by a new retroactive law be arbitrarily taken away by legislative fiat. This position seems to be well taken. (See Fletcher vs. Peck, 6 Cranch [10 U. S.], 87, 135; Blodgett vs. Holden, 275 U. S. 142; Calder vs. Bull, 3 Dallas [3 U. S.], 385; Twining vs. N. J., 211 U. S. 78; Hurtado vs. California, 110 U. S. 516; Calder vs. Bull, 3 U. S. 385, cited by appellant, where the subject of the constitutional limitation upon retroactive legislation is considered by the Supreme Court.) That is to say, whether we regard the power of the Commission in establishing a just and reasonable rate as a basis of reparations as a judicial power or as a legislative power, in either event rates established by the legislative power and collected by the carrier cannot be taken from it because it is subsequently determined to be excessive, whether the belated determination is by court or legislature, or, to use the phrases more commonly applied to the acts of the Commission, whether such subsequent determination is *quasi*-legislative, administrative or *quasi*-judicial—in either event a rate established by law—lawful when charged, remains lawful when attacked later by the shipper. The view we have expressed is supported by all the decisions of state courts construing laws establishing rate-regulating bodies having power to grant reparations for excessive rates charged by the carrier. (M., K. & T. Ry. vs. R. Com. of Texas, 3 S. W. [2] 489; Id., 13 S. W. [2] 680; Mathieson Alkali Works vs. N. & W. Ry. Co., 147 Va. 426, 37 S. E. 608; Miller Mill Co. v. L. & N. Co., 207 Ala. 253, 92 So. 797; Young Co. vs. Payne,

127 Miss. 48, 89 So. 782; Bonfils vs. Public Utility Comm., 67 Colo. 563, 189 Pac. 775; Northern Pacific Ry. Co. vs. Dept. of Pub. Works, 136 Wash. 389, 240 Pac. 362; Texas & Pac. Ry. Co. vs. R. R. Comm., 137 La. 1089, 69 So. 837.) To the same effect is the decision of the Railroad Commission of California, 2 Cal. R. R. Comm. Reports 626. A similar decision was rendered September 16, 1930, by the United States District Court for the Southern District of Mississippi in Eagle Cotton Oil Co. vs. So. Ry. Co. (not yet reported), wherein the order of the Interstate Commerce Commission in a case of the same title reported in 140 I. C. C. 131, granting reparations for excessive rates that had been fixed by the Commission, was held void. The appellee cites the decision of the Supreme Court in U. S. vs. M. & M. Traffic Ass'n., 242 U. S. 178, as decisive of the question as to the power of the Commission to make reparations on the basis that Commission-made rates were unreasonable. This decision, as we understand it, merely holds that a shipper who is not a party to a proceeding attacking a rate as unreasonable cannot properly ask for a rehearing of its decision, but should file a new application attacking the rate, as permitted by section 13 of the Transportation Act. On such application he would be entitled to a hearing notwithstanding the previous determination of the Commission in the other case. This decision does not deal with the question of reparations. Our attention is also directed to a decision of the United States District Court (in a three-judge case), McLean Lbr. Co. vs. U. S., 237 Fed. 460, 466, where

that court held that a shipper could invoke the aid of a court to review the action of the Commission on the ground that the rate is unreasonably high. It is sufficient to say of this case that the question involved was not one of reparations, but of the power of the court to review the order of the Commission fixing a new rate, upon the ground that its action was not in pursuance of its authority and that the rate fixed was unreasonably high. The court held that it could entertain a bill to inquire into the matter at the instance of a party to the proceedings before the Interstate Commerce Commission, but it also held that the finding of the Commission as to the reasonableness of the rate it established was conclusive where supported by substantial evidence (Id., p. 470). This decision has no bearing upon the question involved here as to the power of the Commission to award reparations in conflict with its own previous findings as to the reasonableness of a rate.

The decision of the Supreme Court in Baltimore & O. R. R. vs. U. S., 279 U. S. 781, is cited as sustaining the power of the Commission to make an award in opposition to its finding in the "first case" and to make reparations accordingly. That case merely decided that when the order of the Commission was set aside by the court as illegal the court could order a restoration of funds paid under the erroneous order as a part of the relief granted the parties attacking the validity of the order. This decision does not support the conclusion that a court could set aside a previous judgment, or decree, in a

subsequent suit brought for that purpose, merely because in the former suit an erroneous view of the evidence had resulted in the judgment, or decree, nor is it authority for the proposition that a court can set aside a law or legislative act because the legislators were induced to pass the legislation by false or erroneous or insufficient evidence. Such power does not exist. There are statements in the opinion of the Supreme Court in Reagan vs. Farmers L. & T. Co., 154 U. S. 362, 367, that militate against the views herein expressed. We quote from that opinion the paragraph relied upon by *amici curiae* to sustain the power of the Commission to award reparations against past collections of Commission-made rates.

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.* The courts are not authorized to revise

or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In Chicago, B. & W. R. Co. vs. Iowa, 94 U. S. 155 (24 L. Ed. 94), and Peik vs. Chicago & N. W. R. Co., 94 U. S. 164 (24 L. Ed. 97), the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control." (Italics ours.)

It is therefore argued that as the courts could formerly award reparations even against legislative rates, the Commission, acting as a *quasi*-judicial body, can now exercise that function. In considering this decision it should be observed that the paragraph relied upon, so far as it refers to the power of the court to review a legislative rate because such rate is excessive, was not involved in the case. The question for decision was the power of the court to relieve a carrier from rates so low as to be confiscatory (Id., p. 399), a power now universally conceded. This dictum in Reagan vs. Farmers L. & T.

Co., *supra,* is inconsistent with the theory of reparations for excessive or discriminatory rates stated in Mitchell Coal Co. vs. Penna. R. R. Co., 230 U. S. 247, 259, *supra,* as follows:

> "Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and the shippers are alike bound to treat them as lawful. After the rate has been abandoned the carrier is still obliged to treat it as having been lawful and cannot refund what has been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but would have to go further and treat as unreasonable a rate, past or present, which the statute had declared should be deemed lawful until it had been held otherwise by the Commission."

This case dealt with the power of the courts under the Commerce Act (24 Stat. 382), the predecessor of the Transportation Act involved here. In that case it was also said that:

> "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on

the claim that unreasonable allowances have been paid." (See, also, Skinner & Eddy Co. vs. U. S., 249 U. S. 557, 562.)

The parties here concede that the Commission alone must declare the unreasonableness of the past rate and ascertain the reasonable rate that should be charged as a basis for reparations. There is no helpful analogy between the common law power of the courts in giving relief against unreasonable rates and the statutory power of the Commission to make reparations, for in the latter case jurisdiction is statutory and the new rate is one that upon ascertainment must be applied in all subsequent applications for reparations covering that period.

It is contended by *amici curiae* that the rates established by the Commission June 22, 1921, in the first case, had been set aside and nullified by the act of the carrier in establishing a lower rate and by the proceedings of the Interstate Commerce Commission entitled *Reduced Rates 1922,* 68 I. C. C. 676, wherein the Commission advised certain blanket reduction of rates by percentages, which recommendation was acted upon by the carriers by making a reduction from 96 to 86.5 cents per 100 from California points to Phoenix. We cannot concur in this conclusion. It is based upon the claim, or perhaps it should be only considered a suggestion, to meet the appellants' contention, that the maximum rate fixed by the Commission was the exact and only measure of reasonableness and that therefore a lower rate is necessarily a departure from reasonableness. This suggestion is based upon the as-

sumption that the exact amount of a just and reasonable rate is capable of exact scientific ascertainment, as is the time of an eclipse, or the velocity of light, or as the weight of a cubic foot of water, whereas the extent to which freight rates are reasonable or unreasonable is a matter of judgment to be exercised by men and upon which they will and do differ. The ascertainment of a maximum rate is in effect a decision that any rate below that maximum is reasonable as to the shipper, and that the carrier below that maximum can be trusted to fix a rate that is not too low to protect itself. There was no change in the subsequent action of the Commission or of the carrier which affected the maximum; and no change in the maximum by the Commission, because the voluntary act of the carrier in reducing its rate to 86.5 made an order unnecessary. The nature of this blanket order of the Commission was considered by the Supreme Court in Brimstone R. R. & Canal Co. vs. U. S., 276 U. S. 104.

Judgments reversed.

[Endorsed]: Opinion. Filed March 23, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6284.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Appellants,

vs.

ARIZONA GROCERY COMPANY, a Corporation,

Appellee,

and

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Appellants,

vs.

ARIZONA GROCERY COMPANY, a Corporation,

Appellee.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

Upon appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona, and was duly submitted:

On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the judgment of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Judgment. Filed and entered Mar. 23, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

MOTION TO STAY ISSUANCE OF MANDATE.

Now comes the Arizona Grocery Company, the appellee in the above-entitled cause, and shows to this court that said appellee desires a stay of the issuance of the mandate in the above-entitled cause, for the purpose of applying to the Supreme Court of the United States for the issuance of a writ of certiorari.

WHEREFORE, said appellee prays that the mandate of this court be stayed and withheld until May 21, 1931, or such time as to the court shall seem proper.

Dated this 7th day of April, 1931.

ELLIOTT & SNELL,
Attorneys for Appellee.

The receipt of a copy of the within instrument acknowledged this 7th day of April, 1931.

BAKER & WHITNEY,
Attorneys for Appellants.

[Endorsed]: Motion to Stay Issuance of Mandate. Filed Apr. 9, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Elliott & Snell, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this court in the above cause be, and hereby is stayed to and including May 21, 1931; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated: San Francisco, California, April 9, 1931.

[Endorsed]: Filed Apr. 9, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing four hundred and sixty-five (465) pages, numbered from and including 1 to and including 465, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of April, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1280)

FILE COPY

MAY 19
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM 1930

No. 98

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	2
Reasons Relied Upon for Allowance of Writ	7
Prayer for Writ	9
Brief in Support of Petition for Writ of Certiorari	10
I Opinion of the Court Below	10
II Jurisdiction	11
III Statement of the Case	11
IV Specification of Errors	12
V Summary of the Argument	13
Argument	13
A. The present question is an important one of federal law which has not been, but should be, settled by this Honorable Court	13
B. Unless this Honorable Court takes this case for review upon this petition for writ of certiorari, the petitioners will be denied their property, to which they are entitled under the Interstate Commerce Act, without due process of law	16
C. The opinion and decision of the Circuit Court of Appeals in the present case is in a way probably in conflict with the decisions of this Honorable Court	18
D. In other cases involving the validity of reparation orders, this Honorable Court has granted writs of certiorari	20
Conclusion	20

CASES CITED

	Page
Arizona Corporation Commission, et al., vs. A., T. & S. F. Ry. Co., 156 I. C. C. 418	15
A., T. & S. F. Ry. Co. vs. Spiller, 253 U. S. 117	11, 20
Baer Brothers vs. D. & R. G. R. Co., 233 U. S. 479	19
Eagle Cotton Oil Co. vs. Southern Railway Co., et al., 140 I. C. C. 131	15
Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412	11, 20
New York, N. H. & H. R. Co. vs. I. C. C., 200 U. S. 361	17
Pennsylvania R. Co. vs. Puritan Coal Min. Co., 237 U. S. 120 130	17
Reagan vs. Farmers L. & T. Co., 154 U. S. 362, 367	18, 19
Southern Pacific Co. vs. Darnell-Taenzer Lumber Co., 245 U. S. 531	11, 20
Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. A., T. & S. F. Ry. Co., et al., 95 I. C. C. 146	6
Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. A., T. & S. F. Ry. Co., et al., 140 I. C. C. 171	15
U. S. vs. Pacific & A. R. & Nav. Co., 228 U. S. 87	17

STATUTES CITED

	Page
Interstate Commerce Act, Sec. 1	6, 18
Interstate Commerce Act, Sec. 8	6
Interstate Commerce Act, Sec. 9	6, 7
Interstate Commerce Act, Sec. 13	7, 17
Interstate Commerce Act, Sec. 15	5
Interstate Commerce Act, Sec. 16	2, 7, 17
Judicial Code, 28 U. S. C. A., Sec. 347	11

Supreme Court of the United States

OCTOBER TERM 1930

No. .....

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Arizona Grocery Company, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in that certain cause entitled The

Atchison, Topeka & Santa Fe Railway Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, and Southern Pacific Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, which decree was entered on the 23rd day of March, 1931 (R. 438-462), and in support thereof respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

The present case is one arising under the Federal Transportation Act. The question involved turns upon the construction and interpretation of portions of this Act and involves the constitutionality thereof. The facts are as follows:

The Interstate Commerce Commission on the 11th day of March, 1929, granted your petitioner an order of reparation against the respondent carriers (R. 321-323). This order was made in conformity with the findings and opinion of the Interstate Commerce Commission, in which the Commission found that the respondent carriers had charged the petitioner and others unreasonable rates on sugar moving into Phoenix, Arizona, from various points in California (copy of Commission's opinion, R. 290-319).

The respondent carriers refused to comply with the order of the Interstate Commerce Commission (R. 262). Two actions were duly filed by your petitioner in the United States District Court for Arizona against the respondent carriers, based upon this order of the Interstate Commerce Commission and in conformity with Section

16 (2) of the Transportation Act, *49 U. S. C. A., Section 16 (2)*, (R. 2-8; 48-54). The cases were tried by the court, sitting without a jury. There was practically no issue of fact, the matter having been submitted to the court on an Agreed Statement of Facts (R. 254-319). The District Court sustained the order of the Interstate Commerce Commission and ordered judgments in accordance therewith and in favor of your petitioner (R. 225, 228). From these judgments the respondent carriers prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The two cases were presented to the Appellate Court on a consolidated record and treated as one case. The Appellate Court reversed the judgments of the trial court and found the order of the Interstate Commerce Commission to be invalid (R. 438-462; 464).

The Agreed Statement of Facts upon which the cases were submitted to the trial court sets forth the following essential facts: On June 22, 1921 the Interstate Commerce Commission prescribed the maximum rates on sugar from various California points to Phoenix, Arizona, which maximum rate became effective on September 17, 1921 (R. 263-275). On November 3, 1922 the reasonableness of the rates on sugar charged by the respondent carriers from California points to Phoenix, Arizona was challenged by various Phoenix shippers in a complaint filed before the Interstate Commerce Commission, as provided in Section 13 of the Transportation Act (R. 277). This complaint was later consolidated with other similar complaints (R. 290). These were not finally determined until March 12, 1928, at which time the Interstate Commerce Commission found that the respondent carriers had in fact charged Phoenix shippers (including your

petitioner) unreasonable rates and that such shippers had been damaged in the amount of the difference between the charges paid and those which would have accrued at the rates therein found to have been reasonable (R. 290-309). In conformity with these findings, the Interstate Commerce Commission made its order of reparation in favor of your petitioner and against the respondent carriers (R. 46, 47). Similar orders were made on behalf of other shippers. The shipments of your petitioner upon which reparation was allowed were transported between February 21, 1923 and February 10, 1925, and were made at rates equal to or less than the maximum rate previously approved by the Interstate Commerce Commission on June 22, 1921 and effective on September 17, 1921 (R. 442). Such shipments were made subsequent to November 3, 1922, the date upon which a complaint was filed by Phoenix shippers challenging the reasonableness of such rates (R. 443).

The respondent carriers, in briefs and arguments in the District Court and in the Circuit Court of Appeals, contended that the reparation order in question is invalid, and their grounds for such invalidity may be summarized as follows:

1. The charges assessed upon plaintiff's shipments involved accrued under rates which were conclusively just and reasonable, and in conformity with the requirements of the Interstate Commerce Act, at the times the shipments moved.

(a) The rates successively in effect and applicable upon said shipments were published and assessed by the defendants in conformity with a continuing and effective order of the Commission.

(b) Rates published and assessed in compliance with a continuing valid order of the Commission are thereby conclusively established as just and reasonable rates, and cannot, in legal contemplation, be "unreasonable in fact."

2. The Interstate Commerce Act does not purport to confer jurisdiction upon the Commission to award reparation against rates approved or prescribed by the Commission, or against rates which are less in amount than rates so approved or prescribed.

(a) The Act authorized the Commission to award damages to a private party only when he suffers legal damage because of the violation of the Act by a carrier subject thereto.

(b) The publication and assessment of rates in conformity with a continuing valid order prescribing maximum reasonable rates cannot be a violation of the Act, and therefore cannot give rise to legal damages.

3. If the Interstate Commerce Act is so construed as to confer jurisdiction upon the Commission to order reparation against Commission-made rates, it is to that extent unconstitutional and void, and any orders of the Commission issued in purported exercise of such unconstitutional provisions of the Act are likewise void, in that the enforcement of the Commission's order would deprive the defendants of property without due process of law, and would therefore contravene the Fifth Amendment to the Federal Constitution.

On the other hand, your petitioner's contentions sustaining the validity of the order may be summarized as follows:

1. Section 15 (1) *49 U. S. C. A., Sec. 15 (1)*, confers upon the Interstate Commerce Commission the power to

prescribe just and reasonable rates, or the maximum or minimum, or maximum and minimum rates, to be charged by carriers subject to the Act.

2. The rate prescribed by the Commission's order in *Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. Atchison, Topeka and Santa Fe Railway Company, et al., 95 I. C. C. 146,* (R. 166-180) was a maximum rate. Under this order, the carriers still possessed the discretionary power to voluntarily charge lesser rates.

3. Section 1 (4 and 5) of the Interstate Commerce Act, *49 U. S. C. A., Sec. 1 (4 and 5),* requires the carriers to maintain reasonable rates. This places upon the carriers the duty of charging reasonable rates, and such duty is not removed by the approval of a maximum rate by the Interstate Commerce Commission.

4. Under the Transportation Act every unjust and unreasonable rate is prohibited and declared to be unlawful. A shipper has a property right in and to a reasonable rate.

5. Section 8 of the Transportation Act, *49 U. S. C. A., Sec. 8,* provides that in case any common carrier shall commit any unlawful act or omit anything required to be done by the Interstate Commerce Act, it shall be liable to the shipper injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of said Act.

6. Section 9 of the Transportation Act, *49 U. S. C. A., Sec. 9,* grants to any shipper claiming to be damaged by any common carrier the right either to make complaint to the Interstate Commerce Commission or to bring suit in a District Court of the United States of competent jurisdiction.

7. Section 13 of the Transportation Act, *49 U. S. C. A., Sec. 13,* grants to the Interstate Commerce Commission the power and jurisdiction to investigate such complaints as may be filed under Section 9, supra.

8. Section 16 (1) of the Transportation Act, *49 U. S. C. A., Sec. 16 (1),* confers upon the Commission the quasi-judicial power and jurisdiction to grant awards of reparation for violations of the Transportation Act and to make such necessary orders as may be required directing the carrier to pay to the complainant such sums to which he may be entitled on or before a day named.

9. These provisions of the Transportation Act conferred upon the Commission the necessary power and jurisdiction to make the order of reparation in question, and such order was therefore valid and binding upon the respondent carriers.

10. The petitioner was entitled to reasonable rates and the respondent carriers were only entitled to charge reasonable rates. Therefore returning to the petitioner any excess over a reasonable rate did not amount to taking property of the respondent carriers without due process of law, and the provisions of the Transportation Act, permitting the payment of such reparation, are not contrary to the Fifth Amendment to the Constitution.

II

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The matter of the right and power of the Interstate Commerce Commission to award reparation to a shipper when it finds that such shipper has paid rates which were unreasonable, whether such rates were equal to or less

than a previously approved maximum rate, involves an important question of federal law which has not been, but should be, settled by this Honorable Court.

2. The decision of the Circuit Court of Appeals, holding that the Interstate Commerce Commission, under the Transportation Act, did not have authority to award reparation to your petitioner in the present case, involves an important question of federal law which has not been, but should be, settled by this Honorable Court.

3. The questions here presented are of real substance, involving the construction and application of the Transportation Act, a statute of the United States.

4. Unless this Honorable Court takes this case for a review upon this petition for writ of certiorari, the petitioner and other shippers similarly affected will be denied their property, to which they are entitled under the Transportation Act, without due process of law.

5. The decision of the Circuit Court of Appeals in the instant case, holding that the Interstate Commerce Commission, acting in its quasi-judicial capacity, did not have authority to award reparation to your petitioner, is a decision of a federal question in a way probably in conflict with applicable decisions of this Honorable Court.

6. Respondent carriers have admitted that the issues presented are of outstanding importance to all shippers and carriers generally.

7. Because of the importance to the business world and the legal profession of the statute involved, there is need of an authoritative decision as to the power of the Interstate Commerce Commission in such cases.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 6284, The Atchison, Topeka & Santa Fe Railway Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, and Southern Pacific Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and for such further relief as to this Honorable Court may seem proper.

DATED this 12th day of May, 1931.

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1930

No. .....

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, ET AL.,
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AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case has not yet been reported. The opinion was filed March 23, 1931 (R. 438-462).

II.

Jurisdiction

1. The date of the judgment to be reviewed is March 23, 1931 (R. 462).

2. This review is sought under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, *28 U. S. C. A., Sec. 347.*

3. The present case is a civil one heard and determined in the Circuit Court of Appeals for the Ninth Circuit upon appeal from the District Court of the United States for the District of Arizona, and involves the construction, application and interpretation of the Interstate Commerce Act, a Federal statute (R. 438). The application for and the allowance of the writ is sanctioned by the decisions of this Honorable Court in a number of cases, like the present, involving the construction and interpretation of the Interstate Commerce Act.

4. Among the decisions authorizing the writ to review decisions of Circuit Courts of Appeals, involving an interpretation and application of the Interstate Commerce Act and particularly as to questions of reparation orders, see:

Southern Pacific Co. vs. Darnell-Taenzer Lumber Co., 245 U. S. 531;
A., T. & S. F. Ry. Co. vs. Spiller, 253 U. S. 117;
Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412.

III.

Statement of the Case

This has already been stated in the preceding petition, under Paragraph I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the order of the Interstate Commerce Commission, awarding reparation to your petitioner, was invalid.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act does not confer jurisdiction upon the Interstate Commerce Commission to award reparation to your petitioner.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act is unconstitutional and void insofar as it confers jurisdiction upon the Interstate Commerce Commission to award reparation to your petitioner.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Interstate Commerce Commission does not have jurisdiction, acting in its quasi-judicial capacity, to award reparation to a shipper after finding that the rate charged the shipper was unreasonable, even though such rate was equal to or less than a maximum rate previously approved by the Interstate Commerce Commission.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the defendant carriers had not violated the Transportation Act.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that your petitioner did not pay unreasonable rates and charges for the transportation of its goods during the period for which reparation was allowed by the Interstate Commerce Commission.

7. The Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the District Court for the District of Arizona.

V.

Summary of the Argument

Point A. The present question is an important one of federal law which has not been, but should be, settled by this Honorable Court.

Point B. Unless this Honorable Court takes this case for review upon this petition for writ of certiorari, the petitioner will be denied its property, to which it is entitled under the Interstate Commerce Act, without due process of law.

Point C. The opinion and decision of the Circuit Court of Appeals in the present case is in a way probably in conflict with the decisions of this Honorable Court.

Point D. In other cases involving the validity of reparation orders, this Honorable Court has granted writs of certiorari.

ARGUMENT

Point A.

The present question is an important one of federal law which has not been, but should be, settled by this Honorable Court.

It is admitted by all parties concerned in the present matter that the question involved is an important one of federal law which has not been settled by this Honorable Court. Your petitioner cannot improve upon the lan-

guage used by the respondents in their brief submitted to the United States Circuit Court of Appeals for the Ninth Circuit, which referred to the importance of this question as follows:

> "The issues presented by these appeals are of outstanding importance, not merely to the parties to the causes, but to all shippers and carriers generally. Issues pertaining to the Commission's jurisdiction under the Interstate Commerce Act are of tremendous interest to every common carrier engaged in interstate commerce, and to every person who uses the carriers' facilities."

Continuing from the respondents' brief before the lower Appellate Court, showing the fact that the present question has not been settled by this Honorable Court:

> "So far as we are able to learn, the instant case is the first in which a Federal Appellate Court has been called upon to determine whether the Interstate Commerce Commission may validly award reparation against rates published and maintained in conformity with its valid continuing formal order prescribing the reasonable maximum rate thereafter to be charged."

The respondent carriers therefore agree with the petitioner that the present question is an important one to shippers and carriers generally and that it has not been settled by this Honorable Court. The scope of the Interstate Commerce Act and its administration by the Commission make questions like the present one of extreme importance to shippers and carriers.

The Interstate Commerce Commission has always insisted that it possessed the power and jurisdiction to

award reparation in such cases as the present one. There are three recent opinions of the Commission sustaining this position.* In each of these three cases orders of reparation were made to numerous claimants. Your petitioner is advised, and states as information for the benefit of this Honorable Court, that the carriers have resisted the payment of all of these reparation orders, and that same are pending in various federal and state courts. In many of these cases counsel have stipulated that further proceedings be held in abeyance until the final determination of the instant case, for the reason that the same question is involved. The determination of the present case by this Honorable Court will settle this question so that shippers, carriers and the Interstate Commerce Commission will know whether or not the Commission possesses the jurisdictional power to award reparation in such cases. As time goes on, a larger percentage of the rates of the carriers will be prescribed or approved by the Interstate Commerce Commission and the present question will become, therefore, even more important in the future. For this reason there should be a determination by this Honorable Court as to whether the Commission is without power to allow reparation to a shipper who has paid an unreasonable rate simply because such rate has been previously approved or prescribed by the Commission, in the fixing of a maximum rate.

*_Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al._, 140 I. C. C. 171;

Eagle Cotton Oil Company vs. Southern Railway Company, et al., 140 I. C. C. 131;

Arizona Corporation Commission, et al., vs. A., T. & S. F. Ry. Co., 156 I. C. C. 418.

While it is not the office of this brief in support of the petition for the writ of certiorari to argue the incorrectness of the opinion of the Circuit Court of Appeals, your petitioner believes it would not be amiss to point out that under the decision of the Circuit Court of Appeals in the present case no reparation can be allowed a shipper by the Commission in the future, regardless of how unjust and unreasonable the rates paid by the shipper may be, if such rates had been previously approved or prescribed by the Commission in the fixing of a maximum rate. Your petitioner therefore urges that the present question is of extreme importance to the shippers of the United States and should therefore be determined by this Honorable Court, in order that such shippers may be aware of their rights under the Interstate Commerce Act as it now reads.

The present status of the matter is that the Interstate Commerce Commission maintains that it possesses the power and jurisdiction to award reparation to shippers in such cases, if in fact they have paid an unreasonable rate (R. 306, 307). The Circuit Court of Appeals for the Ninth Circuit has held in the present case that the Commission does not possess this power (R. 451). Your petitioner therefore feels that because of this condition and its general importance to carriers and shippers, and because the question involves an important one of federal law, this Honorable Court should determine and settle the matter.

Point B.

Unless this Honorable Court takes this case for review upon this petition for writ of certiorari, the petitioner will be denied its property, to which it is entitled under the Interstate Commerce Act, without due process of law.

It is the contention of shippers, which contention is not denied by the carriers, that they are entitled to reasonable rates. This Honorable Court has stated that the right to reasonable rates is a property right. *Pennsylvania R. Co. vs. Puritan Coal Min. Co., 237 U. S. 120, 130.* The Interstate Commerce Act specifically preserved and protected this property right and gave to shippers a method of protecting this right in case they were charged unjust and unreasonable rates, *49 U. S. C. A., Secs. 13 (1) and 16 (1 and 2).* The fundamental purpose of the Transportation Act was to prevent unjust and unreasonable rates. *New York, N. H. and H. R. Co. vs. Interstate Commerce Commission, 200 U. S. 361.*

The purpose of the Transportation Act was also to establish a tribunal to determine the relation of communities, shippers and carriers, and to fix their respective rights and obligations. *U. S. vs. Pacific and A. R. and Nav. Co., 228 U. S. 87.*

In the present case the Interstate Commerce Commission found that the petitioner was charged an unreasonable rate (R. 34, 46, 47). No evidence to contradict this finding was introduced by the respondents at any stage of the proceedings. It therefore follows that unless the judgment of the Circuit Court of Appeals in the present case is reversed your petitioner will have paid unreasonable rates to the respondents and will therefore have been deprived of property without due process of law and in contravention of the intent and purposes of the Interstate Commerce Act.

The opinion and decision of the Circuit Court of Appeals in the instant case admits that under its construction of the Interstate Commerce Act it is possible that

your petitioner might have been charged unreasonable rates, even though such rates charged were equal to or less than a maximum rate approved by the Commission (R. 451). This opinion holds that the shipper affected by such unreasonable rates might ask for the establishment of a new rate, but that there is no reason why an allowance of reparation should be made for the past (R. 451). Such a construction results in a clear-cut violation of the Act and of its intent and purposes, as expressed in *Section 1 (4 and 5)*. It denies the petitioner the reparation allowed by the Commission and amounts to taking its property without due process of law.

Point C.

The opinion and decision of the Circuit Court of Appeals in the present case is in a way probably in conflict with the decisions of this Honorable Court.

Your petitioner believes that the opinion of the Circuit Court of Appeals for the Ninth Circuit is in a way probably in conflict with a decision of this Honorable Court. This was impliedly admitted in the opinion, as shown by the following statement:

> "There are statements in the opinion of the Supreme Court, in Reagan vs. Farmers L. & T. Co., 154 U. S. 362, 367, that militate against the views herein expressed." (R. 458).

The decision of this court, in the case cited, considered phases of the present question, commenting:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather that a judicial, function. *Yet it has always been*

recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates.* The courts are not authorized to revise or change the body of rates *imposed* by a legislature or *a commission.* They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. *But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable,* and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." (Emphasis supplied.)

The importance of this holding is apparent when it is recalled that the Interstate Commerce Commission, in granting reparation, acts in the nature of a court and possesses quasi-judicial powers. *Baer Bros. vs. D. and R. G. R. Co., 233 U. S. 479.* Your petitioner therefore feels that the decision and opinion of the Ninth Circuit in the present case is contrary to the decision of *Reagan vs. Farmers L. and T. Co., supra,* and for this reason the decision in the present case should be reviewed by this Honorable Court.

Point D.

In other cases involving the validity of reparation orders, this Honorable Court has granted writs of certiorari.

The question of the validity of reparation orders has been before this Honorable Court numerous times. The Court has stated that a writ of certiorari is the proper method by which to review decisions of Circuit Courts of Appeals affecting such reparation orders.

> "An objection is taken to the jurisdiction of this Court upon writ of error. An application is made for a certiorari in case the objection is held good, and as we should grant the latter writ in that event the question has no importance here except as a precedent."
>
> *Southern Pacific Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

Writs have been allowed in similar cases of reparation orders, as shown in the following:

A., T. & S. F. Ry. Co. vs. Spiller, 253 U. S. 117;
Meeker vs. Lehigh Valley R. R. Co., 236 U. S.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and that this Honorable Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1930

No. 983

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

APPLICATION BY PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, WITH APPENDIX, IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

Comes now the Arizona Grocery Company, petitioner, and respectfully requests leave of the court to file a supplemental brief in support of its Petition for Writ of Certiorari, heretofore filed herein. Since the filing of the Petition for Writ of Certiorari and brief in support thereof,

an opinion and decision of the Circuit Court of Appeals for the Fifth Circuit was rendered on the 21st day of July, 1931, in a case entitled *Eagle Cotton Oil Company, a corporation, vs. Southern Railway Company, et al.* (not yet reported; for full copy of opinion see appendix herein), in which there is a concurring opinion, written by Judge Hutcheson, directly opposed to and in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case.

DATED this 24th day of August, 1931.

SAMUEL WHITE,
Counsel for Petitioner,

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1930

No. 983

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

SUPPLEMENTAL BRIEF BY PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

In the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit in the present action, a decision of the United States District Court for the Southern District of Mississippi in an action entitled *Eagle Cotton Oil Company vs. Southern Railway Company, et al.* (46 F. (2d) 1006) was cited as an authority sustaining the

conclusions reached by the court in holding the order of the Interstate Commerce Commission invalid, and therefore refusing reparation to your petitioner (R. 456). This decision of the United States District Court for the Southern District of Mississippi was appealed, and since the filing of the Petition for Writ of Certiorari herein by your petitioner, the Circuit Court of Appeals for the Fifth Circuit on July 21, 1931, rendered its decision and opinion, reversing that of the District Court. The District Court had held an order of the Interstate Commerce Commission allowing reparation to a shipper to be void. The Circuit Court of Appeals for the Fifth Circuit held this order to be valid, and that the shipper was entitled to reparation in accordance with the order of the Interstate Commerce Commission. This opinion sets forth clearly the facts and questions involved, a full copy of the opinion being included in the appendix to this brief. It will be noted that the concurring decision and opinion of Judge Hutcheson in this case is directly opposed to and in conflict with the decision and opinion of the Circuit Court of Appeals for the Ninth Circuit in the present case.

Your petitioner therefore urges, as an additional ground for the granting of its Petition for Writ of Certiorari, heretofore filed herein, this conflict in the opinion of Judge Hutcheson of the Circuit Court of Appeals for the Fifth Circuit in the *Eagle Cotton Oil Company vs. Southern Railway Company* case (set forth in appendix herein) and the decision and opinion of the Circuit Court of Appeals for the Ninth Circuit in the present case (R. 438-462).

This conflict, together with the other grounds urged in the petition heretofore filed herein, your petitioner be-

lieves calls for the exercise by this Honorable Court of its supervisory powers and that to such an end a writ of certiorari should be granted herein, in order that this question may be determined and settled so that the Interstate Commerce Commission, shippers and carriers may know their rights.

Respectfully submitted,

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

APPENDIX

IN THE

Supreme Court of the United States

FOR THE

FIFTH CIRCUIT

No. 6126

EAGLE COTTON OIL COMPANY, a Corporation,

Appellant,

Versus

SOUTHERN RAILWAY COMPANY, ET AL.,

Appellees.

Appeal From the District Court of the United States for the Southern District of Mississippi.

E. B. WILLIAMS, LUTHER M. WALTER, JOHN S. BURCHMORE, NUEL D. BELNAP, ALLAN P. MATTHEW, (FELIX T. SMITH, SAMUEL L. WRIGHT, PAUL M. GREGG, JERRY H. POWELL, F. F. THOMAS, JR., JOHN O. MORAN; PILLSBURY, MADISON & SUTRO; McCUTCHEN, ONLEY, MANNON & GREENE, on the Brief) for Appellant. (As Amicus Curiae).

JOSEPH P. COOK, A. S. BOZEMAN, W. N. McGEHEE, W. E. BASKIN, JAMES E. LYONS, BURTON MASON, HARRY McCALL, (Baskin, Wilbourn & Miller; Bozeman & Cameron, on the Brief) for Appellees. (As Amicus Curiae).

Before BRYAN, FOSTER and HUTCHESON, *Circuit Judges.*

BRYAN, *Circuit Judge.*

This is an action by appellant on an order of the Interstate Commerce Commission awarding reparation on account of excessive freight rates collected by the appellee railroad carriers for the transportation of coal from mines in Alabama to Meridian, Mississippi. The published rate of $2.03 per ton was held by the Commission, in a proceeding begun before it by appellant in 1925, to have been excessive to the extent that it exceeded $1.85 per ton from certain mines and $1.95 from other mines, and these lower rates were prescribed as reasonable for the future. Appellant was awarded reparation measured by the difference between the lower and higher rates on shipments received within two years prior to the filing of its claim up to March 8, 1928, the date of the order. Eagle Cotton Oil Co. v. Southern Railway Co., 140 I. C. C. 131. No attack is made upon the reasonableness of the new rates as applied to the period covered by the reparation award. But the district judge, before whom the case was tried without a jury pursuant to written stipulation, held that the Commission was without power to award reparation on account of shipments made prior to the date of the order finding the $2.03 rate to be unreasonable, because that rate had been fixed and prescribed by it, and, this being so, must be conclusively presumed to have been a reasonable and lawful one. He therefore entered judgment denying appellant's claim for damages. 46 F. (2) 1006.

On July 22, 1915, the Commission in passing upon a proposed increase of rates on coal, authorized a rate not

exceeding $1.20 per ton from the Alabama mines to Meridian. Coal and Coke Rates for the Southeast, 35 I. C. C. 187, 202. An increase of 10c per ton, effective July 1, 1917, was authorized in the Fifteen Per Cent Case, 45 I. C. C. 303. On June 25, 1918, another general increase, but without reference to any particular rate, was made by the Director General, and thereupon appellees published a rate on coal of $1.80 per ton; but this was done without the order or approval of the Commission. On August 26, 1920, the Commission authorized a general increase of 25 per cent of freight rates, but without approval of any particular rate, Ex Parte 74, 58 I. C. C. 220; and appellees raised the rate here involved to $2.25 per ton. On July 1, 1922, the Commission recommended a general reduction of 10 per cent also without approval of any particular rate, Reduced Rates, 1922, 68 I. C. C. 676; and appellees thereupon reduced the rate in question to $2.03 per ton, which they continued to collect up to March 9, 1928, when the $1.85 and $1.95 rates were established by the Commission as maximum rates from the Alabama mines to Meridian. Eagle Cotton Oil Co. v. Southern Railway Co. et al., supra.

These several decisions of the Commission and the order of the Director General are relied on to establish the conclusion that the $2.03 rate was fixed and prescribed by the Commission as a reasonable and lawful maximum rate. The rate of $1.20 per ton on shipments of coal from the Alabama mines to Meridian was the only one that was definitely and specifically authorized by order of the Commission. That rate became effective on October 1, 1915, and, as the law then was, expired by limitation at the end of two years. Compiled Statutes § 8583. It was not until after the passage of the Trans-

portation Act of 1920 that a rate established by the Commission could continue in force without time limit until its further order." 49 U. S. C. A. 15 (2). The Commission's order in the Fifteen Per Cent Case, supra, effective July 1, 1917, authorized a general increase of 10c per ton throughout the country, but did not purport to grant permission to advance any particular rate. The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to rates on coal; besides it was not the equivalent of an order of the Commission, and the Commission by § 10 of the Federal Control Act, 40 Fed. Stat. 456, was given the power to suspend or set it aside. But with the aid of the Director General's order the rate did not exceed $1.80 per ton, which was less than the rates approved by the Commission upon the basis of which it awarded reparation to appellant. The carriers rely on Ex Parte 74, supra, which authorized an increase of 25 per cent in the general level of all rates, but without approval of any particular rate, as their authority for increasing the rate on coal shipped from the Alabama mines to Meridian to $2.25 per ton; and then claim that the rate became $2.03 per ton in 1922 as a result of the Commission's decision in Reduced Rates, 1922, supra. The most that can reasonably be contended for in support of the proposition adopted by the trial court that the $2.03 rate was Commission-made is that it resulted from adding to and building up the rate of $1.20 that was authorized by the Commission. Aside from the fact that the Commission's order entered in 1915, establishing the $1.20 rate, had expired by limitation long prior to the decisions in Ex Parte 74 and in Reduced Rates, 1922, the law, as we understand it, is that orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as

giving approval of or prescribing particular rates. In Brimstone R. R. Co. v. United States, 276 U. S. 104, at page 122, the Supreme Court said: "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. . . . . In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration." It is true that case was dealing with a division of rates, but the principle involved is the same here as it was there. The Supreme Court in that case cited with approval, among other decisions of the Commission, Steel & Tube Co. v. Director General, 61 I. C. C. 526, in which the Commission said that its "sanction of a general adjustment does not carry with it the approval of any particular rate." We are of opinion, therefore, that the trial court erred in holding that the $2.03 rate collected from appellant by appellees had been fixed and prescribed by the Commission, and in entering judgment rejecting appellant's claim for reparation. Having reached this conclusion it is not necessary in this case to decide, and we do not decide, whether or not the power of the Commission to award reparation extends to rates of its own making. The decision of the Circuit Court of Appeals for the Ninth Circuit in Atchison, Topeka & Santa Fe R. R. Co. et al., v. Arizona Grocery Co., ... F. (2), [not yet officially reported] to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission,

upon a valid finding that it was excessive, had the power to award reparation. 49 U. S. C. A. § 9.

The judgment is reversed, and the cause remanded for further proceeding not inconsistent with this opinion.

(ORIGINAL FILED JULY 21st, 1931.)

No. 6126 EAGLE COTTON OIL CO. vs. SOUTHERN RY. CO. HUTCHESON, *Circuit Judge*, Concurring:

I concur in the judgment of reversal. I think it plain that the rate made the subject of the reparation order was not one which had been specifically promulgated by the Commission. I think it equally plain that speaking generally, the rate had received the Commission's approval and sanction.

I understand appellee to contend that in either event reparation could not have been ordered.

In my opinion neither specific approval by the Commission of a general schedule of rates, nor the specific promulgation of a particular rate, prevents the Commission from granting reparation as to that rate, if upon complaint, it is advised that reparation should be made.

I place my concurrence on the broad ground, therefore, that it is immaterial whether the rate made the subject of the reparation order was, as the trial court held, commission-made, or as the Court of Appeals holds, carrier-made. If a shipper has been injured by it, the Commission, and the Commission alone, may order reparation.

By the Transportation Act Congress has placed squarely upon the carriers the burden of establishing and main-

taining just and reasonable rates, has made the carriers responsible in damages to any person injured by their failure so to do so, and has directed the Commission to hear the shipper's complaint and if well founded, to award damages thereon.

By a long line of decisions built upon T. & P. Ry. Co. vs. Abilene, 204 U. S. 426, the character of the Interstate Commerce Commission, its functions as a "tribunal informed by experience" to decide rate questions between carrier and shipper, the limits, the extent of its powers, the sphere within which and the method by which it may and must operate have been carefully worked out and set down.

In addition, the Interstate Commerce Commission has through a long course of practice and in a series of decisions of its own, built up and established for itself with the sanction and approval of the courts, a character of flexibility in the matter of the approach to, the consideration and determination of, rates and practices, and the results flowing therefrom in which the principle of res adjudicata or estoppel by decision has had and can have no just place.

It must of course be conceded that Congress could have by enactment at any time changed this settled character of the Commission and converted it into a body not supervisory and regulatory of carrier rates as it now is, but one which like the state commissions shall in a rigid and final way, except for direct resort to the courts, fix and prescribe rates. I think it perfectly plain that it has never done so.

In view of the structure and history of the Act, the long continued operation under it, the uniform current of

opinion in the Commission and in the courts as to the dual function which permits the Commission prospectively to control the course of rates while preserving its power to retrospectively correct them and to award damages for injustices and injuries which have flowed from their establishment; in view of the fact that though the Act now invoked to deprive the Commission of this power of reexamination has long been in existence this is the first case in which such a holding has been sought, I think it plain that those who would maintain that Congress has changed the character of the Commission should be prepared to point to some clear enactment carrying that intention.

The invoked decisions of the state courts do not support the position of appellee here. They make strongly against it. They show that instead of the states having a ratemaking system like the federal one, not rigid, but flexible, which permits its Commission from time to time and at any time to make orders changing rates, correcting abuses, reforming conditions and awarding reparations, while in reliance upon the power of the Commission to retroactively repair injuries sustained as the result of their prospective orders, shippers may experimentally try out rates before resorting to the courts for relief, their systems are rigid and inflexible.

Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike.

In the State of Texas, for example, the law requires not the carriers, but the Commission to establish reasonable rates. It provides for a review by the courts of any rate, classification order, etc.; adopted by the Commission

whether at suit of carrier or shipper, in which the unreasonableness or injustice not of the carrier's, but of the Commission's rates and practices may be brought into question. Unless upon a timely suit the rates are found unreasonable, they are by law made uncontrovertible as between carrier and shipper. M. K. & T. vs. R. R. Com. 3 S. W. (2d) 489; Producers vs. M. K. & T., 13 S. W. (2d) 679, while in Louisiana though the Commission has the right to award damages, the statute limits the damages which may be awarded to those resulting from "violations of rates, classifications, rules or orders adopted by the Commission." T. & P. vs. Louisiana, 69 So. 837.

The courts in both of these states, in fact in all of the states, decisions from which are cited by appellee, give full recognition to the difference in the character and structure of the jurisdiction exercised by the Interstate Commerce Commission and that exercised by their own Commissions.

In the opinion of the Circuit Court of Appeals in Atchison, Topeka & Santa Fe vs. Arizona Grocery Co. not yet reported holding that the Commission could not award reparation as to the rates specifically theretofore prescribed by it, it is said that under such circumstances "The shipper's remedy would be seasonable application for a change of rates before any serious damage had been suffered."

In my opinion this will not do. This is indeed the remedy, and the only remedy the shipper has under the state systems. This is, however, not the case under the federal system. There the remedy is simpler, more efficacious, more reasonable, more just to shipper and carrier alike, and more consonant with the experimental

character of rates and ratemaking. This system permits rates to be experimentally laid down and experimentally tried out. It preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to at once use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary inequalities and imperfections of this rate structure.

For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant.

(ORIGINAL FILED JULY 21st, 1931.)

FILE COPY

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CHARLES EL

Supreme Court of the United States

OCTOBER TERM 1931

No. 98

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Respondents.

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Respondents.

BRIEF FOR PETITIONER

SAMUEL WHITE,
FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Counsel for Petitioner.

INDEX

	Page
OPINION OF THE COURT BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	6
SUMMARY OF ARGUMENT	8

ARGUMENT:

I THE INTERSTATE COMMERCE ACT CONFERS JURISDICTION UPON THE COMMISSION TO AWARD REPARATION AGAINST RATES WHICH WERE CHARGED UNDER AN ORDER PRESCRIBING A MAXIMUM RATE IF THE RATE CHARGED WAS IN FACT UNREASONABLE.

1. The Commission prescribed a maximum rate but did not fix the just and reasonable rate in the present case	12
2. Provisions of the Act analyzed	15
3. Allowance of reparation in present case only recourse of shipper, and is authorized by act regulating interstate commerce	18

II OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE PRESENT CASE ANALYZED.

1. Character of the rate prescribed by the Commission in Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al., 62 I. C. C. 412	20
2. Dual character of the Interstate Commerce Commission	25
3. Allowance of reparation to plaintiff does not violate Fifth Amendment to the Constitution	28
4. Decisions of State Courts relied upon by the Circuit Court of Appeals do not support the conclusions reached by the court	32
5. Consideration of the decision of the District Court in Eagle Cotton Oil Company vs. Southern Railway Company, 46 Fed. (2d) 1006, relied upon by the Circuit Court of Appeals	35

Page

6. The decision of the Circuit Court of Appeals is based upon an implied restriction in the power of the Interstate Commerce Commission. The provisions of the Act do not justify such implied restric-

6. The decision of the Circuit Court of Appeals is tion 38

7. The decision of the Circuit Court of Appeals in this case conflicts with the principles of interpretation and application of the Interstate Commerce Act previously laid down by this court 42

CONCLUSION 49

CASES CITED

	Page
Baer Bros. vs. Denver R. G. R., 233 U. S. 479	25
Baltimore and Ohio R. Co. vs. U. S., 279 U. S. 781	27
Blodgett vs. Holden, 275 U. S. 142	29
Chicago & A. R. Co. vs. Kirby, 225 U. S. 155	48
Dayton-Goosecreek R. Co. vs. U. S., 263 U. S. 456	18, 31, 41
Eagle Cotton Oil Company vs. Southern Railway Company, 46 Fed. (2d) 1006	35
Eagle Cotton Oil Company vs. Southern Railway Company, 51 Fed. (2d) 443	32, 36, 51
Fletcher vs. Peck, 10 U. S. 87	30
Gr. Northern R. Co. vs. Merchants Elevator Co., 259 U. S. 285, 291	19, 25
I. C. C. vs. Baltimore R. Co., 145 U. S. 265	48
I. C. C. vs. L. & N. R. Co., 73 Fed. 409, 428	29
L. & N. R. Co. vs. Maxwell, 237 U. S. 94	19
Mathewson Alkali Works vs. N. & W. Ry. Co., 137 S. E. 608	33
McLean Lumber Co. vs. U. S., 237 Fed. 460, 466	20, 31
Mitchell Coal and C. Co. vs. Pa. R. Co., 230 U. S. 247, 259	44, 45
M. K. & T. R. Co. vs. I. C. C., 164 Fed. 645	20
M. K. & T. R. Co. vs. R. R. Commission, 3 S.W. (2d) 469	33
New Pittsburgh Coal Co. vs. H. V. Railway Co., 26 I. C. C. 121, 125	40
News Syndicate vs. N. Y. Central R. Co., 275 U. S. 179, 187	14
Producers' Refining Co. vs. M. K. & T. R. Co., 13 S. W. (2d) 679	33
Reagan vs. Farmers L. & T. Co., 154 U. S. 362, 367	42
Skinner and Eddy Corp. vs. U. S., 249 U. S. 557, 568	29, 39, 41
Smith vs. Townsend, 148 U. S. 490	47
S. P. Co. vs. Darnell-Taenzer Lumber Co., 245 U. S. 531	18, 31, 41
Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426	18, 19, 28, 44

Page

Texas & Pacific Ry. Co. vs. R. R. Commission of La., 69 So. 837 ..... 33, 34

Topeka Traffic Assn. vs. A. & V. Ry. Co., 27 I. C. C. 428, 433 39

Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al., 95 I. C. C. 244 ..... 5, 6

Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al., 140 I. C. C. 171 ..... 3, 5, 24, 50

Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al., 62 I. C. C. 412 ..... 4, 13, 14, 20, 23, 50

Young Heading Co. vs. Paine, 89 So. 782, 786 34

STATUTES CITED

28 U. S. C. A., Sec. 347 2

49 U. S. C. A., Sec. 1 ..... 10, 15

49 U. S. C. A., Sec. 8 ..... 10, 15

49 U. S. C. A., Sec. 9 ..... 10, 16

49 U. S. C. A., Sec. 13 ..... 11, 16

49 U. S. C. A., Sec. 15 ..... 9, 12, 17

49 U. S. C. A., Sec. 16 ..... 3, 11, 16

Supreme Court of the United States

OCTOBER TERM 1931

No. 98

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Respondents.

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Respondents.

BRIEF FOR PETITIONER

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case is reported in 49 *Fed.* (2*d*) 563. No opinion was rendered by the District Court

in these cases. However, the court rendered Findings of Fact and Conclusions of Law, which are set forth in the record (R. 355-375).

JURISDICTION

1. This court on the 12th day of October, 1931, granted the Petition for Writ of Certiorari filed herein by the petitioner.

2. The date of the judgment of the Circuit Court of Appeals to be reviewed is March 23, 1931 (R. 462).

3. This review was sought and allowed by this court under the provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 *Stat.* 938, 28 *U. S. C. A., Sec.* 347.

4. The present case is a civil one, heard and determined in the Circuit Court of Appeals for the Ninth Circuit upon appeal from the District Court of the United States for the District of Arizona, and involves the construction, application and interpretation of the Interstate Commerce Act, a Federal statute (R. 438).

STATEMENT OF THE CASE

The present case is one arising under the Federal Transportation Act. The question involved turns upon the construction and interpretation of portions of this Act and involves the constitutionality thereof. The facts are as follows:

The Interstate Commerce Commission on the 11th day of March, 1929, granted the petitioner an order of reparation against the respondent carriers (R. 321-323). This order was made in conformity with the findings and opinion of the Interstate Commerce Commission, in which the Commission found that the respondent carriers had charged the petitioner and others unreasonable rates on sugar moving into Phoenix, Arizona, from various points in California. This decision is entitled *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, and is reported in 140 *I. C. C.* 171. This opinion is also set forth in the record (R. 290-319).

The respondent carriers refused to comply with the order of the Interstate Commerce Commission (R. 262). Two actions were duly filed by the petitioner in the United States District Court for Arizona against the respondent carriers, based upon this order of the Interstate Commerce Commission and in conformity with Section 16 (2) of the Transportation Act, 49 *U. S. C. A., Sec.* 16 (2), (R. 2-8; 48-54). The cases were tried by the court, sitting without a jury. There was practically no issue of fact, the matter having been submitted to the court on an Agreed Statement of Facts (R. 254-319). The District Court sustained the order of the Interstate Commerce Commission and ordered judgments in accordance therewith and in favor of your petitioner (R. 225, 228). From these judgments the respondent carriers prosecuted an appeal to the United States Circuit Court of Appeals for

the Ninth Circuit. The two cases were presented to the Appellate Court on a consolidated record and treated as one case. The Appellate Court reversed the judgments of the trial court and found the order of the Interstate Commerce Commission to be invalid (R. 438-462; 464).

The Agreed Statement of Facts upon which the cases were submitted to the trial court sets forth the following essential facts: On June 22, 1921, the Interstate Commerce Commission rendered its decision entitled *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al.*, 62 *I. C. C.* 412. In that decision the Commission found that for the future rates on sugar in carloads from all points in California to Phoenix, Arizona, should not exceed 96.5 cents.* The defendant carriers were ordered to establish, on or before September 17, 1921, rates not exceeding the figure named. A copy of the Commission's opinion and order is embodied in the record (R. 152-163). On September 17, 1921, the carriers established a rate of 96 cents. That rate was afterward twice voluntarily reduced, first to 86.5 cents (July 1, 1922) and later to 84 cents (January 10, 1924) (R. 257, 258).

On November 3, 1922, the reasonableness of rates on sugar charged by carriers from California points to Phoenix, Arizona, was challenged by Phoenix shippers in a complaint filed before the Interstate Commerce Com-

*—All rates herein are stated in amounts per 100 pounds.

mission, as provided in Section 13 of the Transportation Act (R. 277). On January 6, 1925, in response to this complaint, the Commission rendered its decision in *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 244.

In that decision the Commission found that the rate of 84 cents then in effect on sugar from California points to Phoenix was and in the future would be unreasonable, and ordered rates not exceeding 71 cents to be established effective February 25, 1925. The opinion and order in this case are reproduced in the record (R. 276-290). The Commission in this case found that the shippers were entitled to reparation, but no order for the payment of reparation was actually made for the reason that this case was subsequently reopened and consolidated with a number of other cases, in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, and were known as *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 140 *I. C. C.* 171. This case is reproduced in the record (R. 290-319). In this case the Commission found that the rates on sugar were unreasonable in the past and during the period in which the shipments of the petitioner were made, to the extent that such rates exceeded 71 cents from southern and 73 cents from northern California points, and that for the future such rates should not exceed 61 cents from southern and

73 cents from northern California points. The Commission further found that the petitioner had been damaged in the amount of the difference between the rates paid and those which would have accrued at the rates therein found reasonable. In conformity with these findings the Interstate Commerce Commission made its order of reparation in favor of the petitioner and against the respondent carriers (R. 46, 47). This order forms the basis for the present actions. Similar orders were made on behalf of other shippers. The shipments of the petitioner upon which reparation was allowed were transported between February 21, 1923, and February 10, 1925, during the period when the rate fixed by the carriers was either 86.5 cents or 84 cents, as hereinabove stated (R. 442). All of such shipments were made subsequent to November 3, 1922, the date upon which the complaint was filed by Phoenix shippers challenging the reasonableness of such rates, in the case of *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 244, referred to *supra*. As previously stated, this complaint was not finally determined until March 12, 1928.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the order of the Interstate Commerce Commission, awarding reparation to the petitioner, was invalid.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act does not confer jurisdiction upon the Interstate Commerce Commission to award reparation to the petitioner.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act is unconstitutional and void in so far as it confers jurisdiction upon the Interstate Commerce Commission to award reparation to the petitioner.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Interstate Commerce Commission does not have jurisdiction, acting in its quasi-judicial capacity, to award reparation to a shipper after finding that the rate charged the shipper was unreasonable, even though such rate was equal to or less than a maximum rate previously approved by the Interstate Commerce Commission.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the respondent carriers had not violated the Transportation Act.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the petitioner did not pay unreasonable rates and charges for the transportation of its goods during the period for which reparation was allowed by the Interstate Commerce Commission.

7. The Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the District Court for the District of Arizona.

SUMMARY OF ARGUMENT

Before proceeding with the argument in this case the petitioner believes it proper to state briefly the position taken by the respondent carriers before the Circuit Court of Appeals for the Ninth Circuit. The carriers contended that the order of reparation allowed the petitioner was invalid, and their grounds for such invalidity may be summarized as follows:

1. The charges assessed upon plaintiff's shipments involved accrued under rates which were conclusively just and reasonable, and in conformity with the requirements of the Interstate Commerce Act, at the times the shipments moved.

(a) The rates successively in effect and applicable upon said shipments were published and assessed by the defendants in conformity with a continuing and effective order of the Commission.

(b) Rates published and assessed in compliance with a continuing valid order of the Commission are thereby conclusively established as just and reasonable rates, and cannot, in legal contemplation, be "unreasonable in fact."

2. The Interstate Commerce Act does not purport to confer jurisdiction upon the Commission to award reparation against rates approved or prescribed by the Commission, or against rates which are less in amount than rates so approved or prescribed.

(a) The Act authorized the Commission to award damages to a private party only when he suffers legal damage because of the violation of the Act by a carrier subject thereto.

(b) The publication and assessment of rates in conformity with a continuing valid order prescribing maximum reasonable rates cannot be a violation of the Act, and therefore cannot give rise to legal damages.

3. If the Interstate Commerce Act is so construed as to confer jurisdiction upon the Commission to order reparation against Commission-made rates, it is to that extent unconstitutional and void, and any orders of the Commission issued in purported exercise of such unconstitutional provisions of the Act are likewise void, in that the enforcement of the Commission's order would deprive the defendants of property without due process of law, and would therefore contravene the Fifth Amendment to the Federal Constitution.

On the other hand, the petitioner's contentions sustaining the validity of the order may be summarized as follows:

1. Section 15 (1), 49 *U. S. C. A., Sec.* 15 (1), confers upon the Interstate Commerce Commission the power to prescribe just and reasonable rates, or the maximum or minimum, or maximum and minimum rates, to be charged by carriers subject to the Act.

(a). The rate prescribed by the Commission's order in *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 146 (R. 166-180), was a maximum rate. Under this order, the carriers still possessed the discretionary power to voluntarily charge lesser rates.

2. Section 1 (4 and 5) of the Interstate Commerce Act, 49 *U. S. C. A., Sec.* 1 (4 and 5), requires the carriers to maintain reasonable rates. This places upon the carriers the duty of charging reasonable rates, and such duty is not removed by the approval of a maximum rate by the Interstate Commerce Commission.

(a) Under the Transportation Act every unjust and unreasonable rate is prohibited and declared to be unlawful. A shipper has a property right in and to a reasonable rate.

3. Section 8 of the Transportation Act, 49 *U. S. C. A., Sec.* 8, provides that in case any common carrier shall commit any unlawful act or omit anything required to be done by the Interstate Commerce Act, it shall be liable to the shipper injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of said Act.

(a) Section 9 of the Transportation Act, 49 *U. S. C. A., Sec.* 9, grants to any shipper claiming to be damaged by any common carrier the right either to make complaint to the Interstate Commerce Commission or to

bring suit in a District Court of the United States of competent jurisdiction.

4. Section 13 of the Transportation Act, 49 *U. S. C. A., Sec.* 13, grants to the Interstate Commerce Commission the power and jurisdiction to investigate such complaints as may be filed under Section 9, supra.

5. Section 16 (1) of the Transportation Act, 49 *U. S. C. A., Sec.* 16 (1), confers upon the Commission the quasi-judicial power and jurisdiction to grant awards of reparation for violations of the Transportation Act and to make such necessary orders as may be required directing the carrier to pay to the complainant such sums to which he may be entitled on or before a day named.

6. These provisions of the Transportation Act conferred upon the Commission the necessary power and jurisdiction to make the order of reparation in question, and such order was therefore valid and binding upon the respondent carriers.

7. The petitioner was entitled to reasonable rates and the respondent carriers were only entitled to charge reasonable rates. Therefore returning to the petitioner any excess over a reasonable rate did not amount to taking property of the respondent carriers without due process of law, and the provisions of the Transportation Act, permitting the payment of such reparation, are not contrary to the Fifth Amendment to the Constitution.

The Circuit Court of Appeals for the Ninth Circuit, in holding the order of the Interstate Commerce Commis-

sion to be invalid, practically adopted the views advanced by the respondent carriers.

The argument of the petitioner, hereinafter set forth, will be directed first to a consideration of specific portions of the Transportation Act pertinent to the present question and second to an analyzation of the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit, now before this court for review. The specification of errors set forth in this brief will be covered under these points.

ARGUMENT

I.

THE INTERSTATE COMMERCE ACT CONFERS JURISDICTION UPON THE COMMISSION TO AWARD REPARATION AGAINST RATES WHICH WERE CHARGED UNDER AN ORDER PRESCRIBING A MAXIMUM RATE IF THE RATE CHARGED WAS IN FACT UNREASONABLE.

---

1. THE COMMISSION PRESCRIBED A MAXIMUM RATE BUT DID NOT FIX THE JUST AND REASONABLE RATE IN THE PRESENT CASE.

Section 15 (1) of the Interstate Commerce Act, *Title 49, U. S. C. A., Sec. 15 (1)*, reads as follows:

> "* * * The Commission is authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * or rates

* * * to be thereafter observed * * *, or the maximum or minimum, or maximum and minimum to be charged * * *."

This section provides that the Commission may prescribe four types of rates: (1) just and reasonable; (2) maximum; (3) minimum; and (4) maximum and minimum.

In the case reported in 62 *I. C. C.* 412, decided June 22, 1921, the Commission prescribed a rate which should not exceed 96.5 cents. The Commission thus prescribed a "maximum rate" and did not prescribe or fix the "just and reasonable rate." Under Section 1 (4 and 5) of the Transportation Act it was the duty of the carriers to file and publish just and reasonable rates. That is, if a rate less than 96.5 cents was the reasonable rate it was the duty of the carrier to file and publish such rate.

An examination of the history of the present rate as set forth previously in the statement of the case will disclose that the rates upon which reparation was allowed were not in fact fixed by the Commission but were rates which had been filed and published by the carriers, the Commission simply having prescribed a maximum rate. There is a clear distinction between a maximum rate and a fixed, just and reasonable rate. A maximum rate is not necessarily a just and reasonable rate. The fact that the Commission prescribed a maximum rate does not relieve the carrier of the duty under Section 1 of the Transportation Act to file and publish a reasonable rate. If

the rate prescribed by the Commission in 62 *I. C. C.* 412 had been a definite, fixed and reasonable rate the carriers by their own action, as disclosed by the facts of this case, would have violated that order. Under an order fixing a reasonable rate the carriers are required and compelled to file and publish that particular rate and no other. In the present case the carriers did not accept and did not comply with the maximum rate of 96.5 cents but instead filed and published a rate of 96 cents. July 1, 1922, the 96 cent rate was voluntarily reduced ten per cent and on January 10, 1924, the 86½ cent rate was voluntarily reduced to 84 cents. Thus if the 96.5 cent rate had been the just and reasonable rate the actions of the carriers would have been in violation of the Commission's order. However, such voluntary reductions were not at variance with the Commission's order because the rate fixed was a maximum rate and the duty was still upon the carrier to fix and charge a reasonable rate, even though such rate would have been lower than the maximum rate. We believe that it is clear from an examination of the Act that the maximum rate prescribed by the Commission did not relieve the carrier of its duty under Section 1 of the Transportation Act. That duty is a continuing one which must be complied with by the carriers; otherwise the Act will be violated and the shipper entitled to damages because of such violation.

News Syndicate vs. N. Y. Central R. Co., 275 U. S. 179, 187.

This principle was in fact recognized by the Circuit Court of Appeals in its opinion in the present case, as will be hereafter pointed out.

2. PROVISIONS OF THE ACT ANALYZED.

The petitioner believes that by grouping the sections together which confer upon the Interstate Commerce Commission its quasi-judicial power, it will be apparent that the Commission had the power and jurisdiction to award reparation in the present case. Portions of these sections which are not pertinent are omitted. These sections are all found in *Title* 49, *U. S. C. A.*

"Section 1 (4):

It shall *be the duty of every* common carrier subject to this chapter engaged in the transportation * * * of property * * * *to establish just and reasonable rates,* fares and charges applicable thereto. * * * *" (Emphasis supplied.)

"Section 1 (5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and *every unjust and unreasonable charge* for such service or any part thereof *is prohibited and declared to be unlawful.*" (Emphasis supplied.)

"Section 8:

In case *any common carrier* subject to the provisions of this chapter *shall do,* cause to be done, or permit to be done *any act,* matter, or thing in this chapter prohibited or *declared to be unlawful,* or shall omit to do any act, matter, or thing in this chapter re-

quired to be done, *such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained* in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Emphasis supplied.)

"Section 9:

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit * * * in any district court of the United States of competent jurisdiction * * *."

"Section 13:

Any person, firm, corporation, company, or association * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition * * *."

"Section 16 (1):

If, after hearing on a complaint made as provided in Section 13 of this chapter, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

"Section 15 (2):

"* * * *All orders of the Commission* * * * shall continue in force until its further order * * * *unless the same* shall be suspended or modified or *set aside by the Commission*, or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied.)

Section 1 (4 and 5) above quoted requires the carrier to charge a just and reasonable rate and declares that any unjust and unreasonable rate is prohibited and unlawful. Section 8 gives the shipper a right to damages whenever the carrier shall commit any act declared by the Interstate Commerce Act to be unlawful. Sections 9 and 13 give the shipper a right to file a complaint before the Interstate Commerce Commission in the event of a violation of the Act by the carrier. By these sections the shipper's common law remedy to resort to the courts has been abrogated, the Commission being substituted for the courts. Section 16 (1) gives the Interstate Commerce Commission the right as a judicial body to award reparation when any unlawful act is committed by the carrier; that is, Section 16 gives the Interstate Commerce Commission power as a judicial body to act retroactively and to award reparation whenever damages arise as provided in Sections 8 and 9. Section 15 (2) gives the Commission the power to set aside a previous order.

In view of these specific provisions of the Transportation Act, the petitioner believes that the Commission

had a clear conception of its judicial power and properly interpreted its right to award reparation in the present case.

It is fundamental in this case that a carrier is entitled only to a just and reasonable rate and reasonable compensation for the service rendered is all that a common carrier is permitted to exact.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

It has also been expressed by this court in the following manner:

> "By investment in a business dedicated to the public service the owner so recognizes that as compared with investment in private business he cannot expect either high or speculative dividends, and that his obligation limits him to only fair or reasonable profit."
> *Dayton-Goosecreek R. Co. vs. U. S.*, 263 U. S. 456.

This court also, in considering the rights of a shipper to reparation, has stated:

> "The carrier ought not to be allowed to retain illegal profit, and the only one who can take it from him is the one that alone was in relation with him and from whom the carrier took the same."
> *S. P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

3. ALLOWANCE OF REPARATION IN PRESENT CASE ONLY RECOURSE OF SHIPPER, AND IS AUTHORIZED BY ACT REGULATING INTERSTATE COMMERCE.

The shipper is compelled to pay the duly filed and published tariff whether such tariff is Commission-made or Railroad-made.

Gr. Northern R. Co. vs. Merchants Elevator Co., 259 U. S. 285, 291;
L. & N. R. Co. vs. Maxwell, 237 U. S. 94;
Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

In the last case cited this court said:

"Concluding as we do that a shipper seeking reparation predicated upon the unreasonableness of the *established* rate, he must under the Act regulating commerce primarily invoke redress through the Interstate Commerce Commission." (Emphasis supplied).

This court did not differentiate between a Commission-made or a Railroad-made rate, but referred only to relief from an "established rate".

There is no distinction between a tariff published by the railroad and one prescribed by the Interstate Commerce Commission; both are binding upon the shipper. Therefore the only recourse for the shipper is to pay the regular tariff, and if such tariff is unreasonable seek recovery before the Interstate Commerce Commission acting as a judicial body. To hold that the shipper would be foreclosed in such a proceeding because of the prior finding and order of the Commission acting as a legislative body would amount to depriving him of his private property without due process of law if in fact the rate charged was unreasonable.

The right to a reasonable rate is a vested property right of the shipper.

M. K. and T. R. Co. vs. I. C. C., 164 Fed. 645.

This has been further stated by a Federal Court as follows:

> "We are of the opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business *is a right of property*, that to enforce such right our system of jurisprudence does not leave him remediless * * *." (Emphasis supplied.)
> *McLean Lumber Co. vs. U. S.* 237 Fed. 460, 466.

Thus we conclude that the Interstate Commerce Act clearly conferred upon the Interstate Commerce Commission the power to award reparation to the petitioner against rates which were charged, if the rates charged were in fact unreasonable, although such rates may have been equal to or less than a maximum rate previously prescribed by the Commission.

II.

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE PRESENT CASE ANALYZED.

1. CHARACTER OF THE RATE PRESCRIBED BY THE COMMISSION IN *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al.*, 62 *I. C. C.* 412.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was written by Judge Wilbur and for the sake of brevity we shall hereafter refer to this opinion as that of Judge Wilbur.

Judge Wilbur, in analyzing the character of the rate prescribed in the First Case, states that it was a maximum rate. He then examines Section 15 (1) of the Interstate Commerce Act with reference to the four classes of rates provided for therein. The purpose of the maximum rate is stated by him as follows:

> "In our opinion the provisions in regard to the maximum or minimum rate were largely for the convenience of the Commission in dealing with the extremely intricate question of freight rates. In the case at bar freight rates were involved from a number of California points to a number of Arizona points. The Commission did not undertake to fix rates from each separate point in California to each separate point in Arizona, and made a blanket order fixing a maximum rate, and not only authorized but directed the carrier to establish its rates within that maximum. *In so doing it was incumbent upon the carrier to conform to certain principles in rate making*, including, perhaps, the principle of long and short haul." (Emphasis supplied.) (R. 448).

In other words, Judge Wilbur admitted that under a maximum rate order "it was incumbent upon the carrier to conform to certain principles in rate making." When we remember that the cardinal principle of rate making is to fix a just and reasonable rate, as set forth in Section

1 of the Act, it will be readily appreciated that Judge Wilbur recognized that under a maximum rate order the duty still rests upon the carrier to fix and charge a just and reasonable rate; that is, under a maximum rate order of the Commission the carrier is not relieved of the duty placed upon it by Section 1 of the Act. If the carrier fails in this duty and the shipper is damaged, then such shipper has a right, under Sections 9 and 13 of the Act, to file a complaint setting forth his damages by reason of the violation of the carrier's duty, and the Commission, under Section 16 of the Act, has a right to allow same if the facts and evidence show the existence of such damage to the shipper.

Judge Wilbur, further considering a maximum rate, continues:

> "It is clear that a blanket order fixing a maximum rate from a state as large as California to an adjoining state might result in individual rates that would be in fact unreasonable and unjust. * * * If new conditions arose later which rendered rates fixed by the carrier unreasonable, the shipper affected could ask for the establishment of a new rate. The Commission could then re-examine the situation and establish a new rate, but there is no reason why an allowance of reparations should be made. The shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered." (R. 451).

Thus we find that the Circuit Court of Appeals conceded that simply because a maximum rate has been pre-

scribed by the Commission such rate cannot be conclusively as a matter of fact reasonable. The court, in recognizing that such a condition might exist, failed to consider the commanding force of Section 1 (4 and 5) of the Act, which requires every rate and charge to be just and reasonable. Therefore, when a rate becomes unreasonable because of conditions or because "some individual rate would be in fact unreasonable and unjust" such rate necessarily violates Section 1 and is unlawful. Under Section 16 of the Act, when the Commission shall determine that a complainant has been injured because of the violation of some provision of the Act, then the Commission can and should allow reparation to such complainant. This statement by Judge Wilbur in the opinion discloses the erroneous conclusion reached in holding the order of the Interstate Commerce Commission void in the present case.

In addition, Judge Wilbur stated, as shown in the portion quoted above, that the shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered. In the present case there can be no question but that seasonable application was made applying for a change of rate. The order of the Commission in the case of *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al., supra,* prescribing a maximum rate of 96.5 cents became effective on September 17, 1921. On November 3, 1922, Phoenix shippers challenged the reasonableness of the rates being charged by the carriers. Hence no criticism

can be made that the shippers of Phoenix did not seasonably apply for a change of rate. However, the mills of the Commission grind slowly and the final decision was not made in this matter and on this complaint until March 12, 1928. During all this period, namely, between November 3, 1922, and March 12, 1928, the petitioner with other shippers in Phoenix was compelled to pay the rates then in effect and being charged by the carriers. Every shipment made by the petitioner upon which reparation was allowed moved between these dates.

Judge Wilbur's opinion is silent as to the reasons why the plaintiff should not have been entitled to reparation for shipments made during this period when the rates charged the plaintiff were unjust and unreasonable and therefore in violation of Section 1 of the Transportation Act, in view of the seasonable application for a change of rates. There is nothing in the Interstate Commerce Act that specifically or impliedly takes from the Interstate Commerce Commission the power to allow, retroactively, reparation when the Commission finds that the rates charged the shipper were unreasonable and in violation of the Interstate Commerce Act, especially during the years that litigation before the Commission regarding such rates may be in progress. This was the view of the Commission in the present matter as shown in its report, 140 *I. C. C.* 171 *at Page* 180.

> "If we are within our authority in finding that a lower rate would have been reasonable, then it must

follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable and are entitled to reparation, upon adequate proof that they paid or bore such charges." (R. 199).

In the absence of such restrictive power we submit that Section 16 of the Interstate Commerce Act is sufficiently broad and comprehensive to sustain the order of the Interstate Commerce Commission in the present case, particularly when the Commission is specifically authorized in this section to allow reparation under such conditions.

2. Dual Character of the Interstate Commerce Commission.

Judge Wilbur correctly states that this Commission is dual in character—at times it acts in a legislative capacity and at other times in a judicial capacity. This distinction has been determined by this court.

Baer Bros. vs. Denver R. G. R., 233 U. S. 479;
Gr. Northern R. Co. vs. Merchants Elevator Co., supra.

It is the view of the petitioner that the Commission, acting in a judicial capacity, has a right to determine, in view of the facts then before it, whether the rate in question was in fact just and reasonable and in compliance with the Interstate Commerce Act. The fact that such rate had been previously prescribed as a maximum rate by the Commission acting in a legislative capacity can-

not be conclusive in such a judicial proceeding. This we believe is a correct statement of the general principles of law. Judge Wilbur takes the position, however, that a court is bound in its determination by the law. Upon this there is no question, but the law as far as shippers and carriers are concerned requires that all rates must be just and reasonable.

In attempting to dispose of this question, Judge Wilbur states:

> "Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (Sec. 16 (1)) delegating power to the Commission to award reparations limits that power to parties entitled to an award of damages under the provisions of this chapter and a violation thereof." (R. 452).

Previously we have quoted a portion of his opinion which admitted that under a maximum blanket rate order it is very possible that an individual rate may be unjust and unreasonable. An unjust and unreasonable rate is in violation of the Act, itself, as set forth in Section 1 thereof. Thus the duty of the Commission acting in its judicial capacity is to determine whether or not under the particular facts and circumstances of the case then before it the rate as applied to the complainant is just and reasonable. In such determination, under the principles

of law and under the provisions of the Interstate Commerce Act, it cannot be bound conclusively by the previously prescribed maximum blanket rate order.

Judge Wilbur, in disposing of the case of *Baltimore and Ohio R. Co. vs. U. S.*, 279 *U. S.* 781, stated:

> "That case merely decided that when the order of the Commission was set aside by the court as illegal the court could order a restoration of funds paid under the erroneous order as a part of the relief granted the parties attacking the validity of the order. This decision does not support the conclusion that a court could set aside a previous judgment or decree in a subsequent suit brought for that purpose merely because in the former suit an erroneous view of the evidence had resulted in the judgment or decree, nor is it authority for the proposition that a court can set aside a law or legislative act because the legislators were induced to pass the legislation by false or erroneous or insufficient evidence." (R. 457, 458).

When this decision of the Supreme Court is considered and applied to the present case we find a similarity of conditions. In this case the court held that a court has the right to set aside an erroneous order of the Interstate Commerce Commission, made in its legislative capacity, and that in setting aside such order it had the power to adjust the rights between the parties litigant. When we remember that the Interstate Commerce Commission in the present case in considering the question of reparation acted as a judicial body, it then becomes clear

that it had the right to consider the correctness of the prior legislative order of the Commission, and if that order was erroneous it could be set aside and the shippers and the carriers be placed in their true lawful position by allowing the shipper a just and reasonable rate. The only method provided for a shipper under the Interstate Commerce Act to attack an unjust and unreasonable rate is to file a complaint before the Commission in accordance with Sections 9 and 13 of the Act.

Texas & Pacific R. Co., vs. Abilene Cotton Oil Co., supra.

Prior to the Transportation Act the shipper secured this relief in the courts, just as the parties in the Supreme Court case above cited obtained their relief in the courts. The fact that the Act took from the shipper the right to a proceeding in court does not mean that the shipper forfeited his lawful rights to a just and reasonable rate. The rights remained the same. Only the remedy and method of procedure were changed. To hold otherwise would result in the shipper being injured by the very act that was intended to benefit and protect him.

3. ALLOWANCE OF REPARATION TO PLAINTIFF DOES NOT VIOLATE FIFTH AMENDMENT TO THE CONSTITUTION.

The opinion of the Circuit Court of Appeals holds that to compel the carriers to comply with the order of the Interstate Commerce Commission in the present case would amount to taking their property without due pro-

cess of law (R. 454, 455). To support this position several cases from this court are cited. We shall not attempt to consider all of these cases in this brief. The cases cited do not deal with the question here presented. On the other hand, this court has held that in the very nature of things there can be no vested right in a rate fixed by the Commission for the future.

Skinner and Eddy Corp. vs. U. S., 249 U. S. 557, 568.

This was further stated by a Federal court as follows:

> "There are no private vested rights in the order of the Commission."
> *I. C. C. vs. L. & N. R. Co.*, 73 Fed. 409, 428.

The only recent case cited by Judge Wilbur is *Blodgett vs. Holden*, 275 U. S. 142. The facts of the case were: Blodgett had made a gift to certain parties during the year 1924, but prior to June 2 of that year, the date of the enactment by Congress of the Revenue Act of 1924. The court held that Congress had no power to impose a charge or tax upon gifts fully consummated before the effective date of the statute. It is to be noted that the act of the taxpayer was fully completed before there was any legislation on the subject. The language of the Supreme Court in this case is:

> "It seems wholly unreasonable that when he, *in entire good faith, without the slightest premonition of such consequence*, made absolute disposition of his

property by gifts he thereafter be required to pay a charge for so doing." (Emphasis supplied.)

Of course, it is wholly incorrect to state that the transportation charges assessed upon the petitioner's shipments were "without the slightest premonition" of a later demand for reparation upon the ground of the unreasonableness of the charges. The Commission had prescribed merely a maximum rate in 1921 and a complaint by Phoenix shippers was filed before the first shipment of the petitioner in the present case moved. The carriers by Section 1 of the Act were under a continuing duty to maintain just and reasonable rates.

Another case cited by the court was *Fletcher vs. Peck*, 10 U. S. 87, in which the court stated:

"But if an act be done under a law, a succeeding legislature cannot undo it."

This case of course does not apply to the present situation. In the first place the law which was in existence at the time the carriers charged the plaintiff the rates upon which reparation was allowed required the carriers to charge just and reasonable rates. (Sec. 1 of the Act). In addition, no succeeding legislature attempted to undo what had been done by a previous legislature. The Commission in allowing reparation in this case acted as a judicial body and not a legislative body.

When we consider the scope, purpose and intent of the Transportation Act, no basis is laid for the position

taken by Judge Wilbur in this regard. The carrier acquires no vested right in any income in excess of a reasonable return on its investment.

Dayton-Goosecreek R. Co. vs. U. S., supra.

The carrier has only a vested right to a fair return. On the other hand, a shipper has a vested property right entitling him to a reasonable rate. This has been stated by this court as follows:

> "The carrier ought not to be allowed to retain illegal profit, and the only one who can take it from him is the one that alone was in relation with him and from whom the carrier took the sum."
> *S. P. Co. vs. Darnell-Taenzer Lumber Co., supra.*

This right of property in the shipper has been recognized by a Federal court as follows:

> "We are of the opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business *is a right of property,* that to enforce such right our system of jurisprudence does not leave him remediless * * *." (Emphasis supplied.)

McLean Lumber Co. vs. U. S., supra.

The authorities cited by Judge Wilbur are not in conflict with these recognized vested rights of both shipper and carrier. They do not justify or require that the reparation order here in question be held invalid.

4. Decisions of State Courts Relied Upon By the Circuit Court of Appeals Do Not Support the Conclusions Reached By the Court.

Judge Wilbur supports his position in the present case by the decisions of various State Courts (R. 455, 456). In truth, these decisions fail to support the opinion of the Circuit Court of Appeals in the present case and generally support the position taken by the petitioner. These same decisions of the various State Courts were called to the attention of the Circuit Court of Appeals for the Fifth Circuit in the case of *Eagle Cotton Oil Company vs. Southern Railway Company*, 51 Fed. (2d) 443, decided July 21, 1931.

Judge Hutcheson in his opinion in considering these cases states:

> "The invoked decisions of the state courts do not support the position of appellee (carriers) here. They make strongly against it. They show that instead of the states having a ratemaking system like the federal one, not rigid, but flexible, which permits its Commission from time to time and at any time to make orders changing rates, correcting abuses, reforming conditions and awarding reparations, while in reliance upon the power of the Commission to retroactively repair injuries sustained as the result of their prospective orders, shippers may experimentally try out rates before resorting to the courts for relief, their systems are rigid and inflexible.

"Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike."

Judge Hutcheson then analyzes two decisions from Texas: *M. K. & T. R. Co. vs. R. R. Commission*, 3 S. W. (2d) 469 and *Producers' Refining Co. vs. M. K. & T. R. Co.*, 13 S. W. (2d) 679, and one from Louisiana: *Texas & Pacific Ry. Co. vs. R. R. Commission of La.*, 69 So. 837, and concludes that in no sense do they sustain the position of the carriers, and he continues as follows:

"The courts in both of these states, in fact in all of the states, decisions from which are cited by appellee, give full recognition to the difference in the character and structure of the jurisdiction exercised by the Interstate Commerce Commission and that exercised by their own Commissions."

We shall not attempt in this brief to analyze each of these cases relied upon by Judge Wilbur, in view of the conclusions reached by Judge Hutcheson above quoted. Comments from three of these cases are so pertinent, however, that we shall refer to them.

In the case of *Mathewson Alkali Works vs. N. & W. Ry. Co.*, (Va. 1927), 137 S. E. 608, the court said:

"*Under the Federal law express power is conferred upon the Interstate Commerce Commission to declare rates unreasonable and discriminatory retroactively and to award reparation* while following the granting of power to the State Corporation Commis-

sion to authorize and prescribe rates—there is no express grant of power to declare them unreasonable retroactively." (Emphasis supplied.)

To the same effect is the case of *Texas & Pacific R. Co. vs. R. R. Commission of La., supra.* In this case the court said:

"Nor are we able to see in what way the particular rulings of the United States courts to which we are referred, relating to the power of the Interstate Commerce Commission, can affect the issue presented in this case since those rulings are predicated *upon an act of Congress which confers upon that commission judicial powers and a certain jurisdiction concurrent with that of the circuit and district courts of the United States;* whereas all such power and jurisdiction are withheld from the defendant (Louisiana R. R. Commission) herein." (Emphasis supplied.)

In the case of *Young Heading Co. vs. Paine* (Miss. 1921), 89 So. 782, 786, the court recognized the distinction between maximum and fixed rates.

"An examination of the cases cited shows that the statutes (Interstate Commerce Act) therein involved provided for fixing of *maximum rates* by the Commission and not rates either above or below which the carriers were allowed to charge, as does our statutes."

Thus these State Courts which we have examined, as well as the others relied upon by Judge Wilbur, clearly

point out the distinction between the Interstate Commerce Act, in which the Commission is given broad and comprehensive powers including the right to prescribe a maximum rate, and the State Acts in which their Commissions are given limited and restricted powers and the right to fix only the exact rate. Judge Wilbur by accepting these decisions as authoritative in the present case, has placed the Interstate Commerce Commission in the same category with the state regulatory bodies. This is not justified and is wholly incorrect, as shown by the very authorities cited by him.

5. CONSIDERATION OF THE DECISION OF THE DISTRICT COURT IN *Eagle Cotton Oil Company vs. Southern Railway Company*, 46 *Fed.* (2d) 1006, RELIED UPON BY THE CIRCUIT COURT OF APPEALS.

In addition to the state decisions referred to by Judge Wilbur, reliance was placed upon the decision of the United States District Court for the Southern District of Mississippi in the case of *Eagle Cotton Oil Company vs. Southern Railway Company*, 46 Fed. (2d) 1006. Judge Wilbur, in relying upon this decision, states:

"A similar decision was rendered September 16, 1930, by the United States District Court for the Southern District of Mississippi in Eagle Cotton Oil Company vs. Southern Railway Company (not yet reported), wherein the order of the Interstate Commerce Commission in a case of the same title, reported in 140 I. C. C. 131, granting reparations for excessive rates that had been fixed by the Commission, was held void." (R. 456).

This decision of the District Court was appealed and since the rendition of the opinion by Judge Wilbur in the present case the Circuit Court of Appeals for the Fifth Circuit reversed the decision of the District Court and upheld the order of the Interstate Commerce Commission, thereby granting reparation to the shipper. This decision is entitled *Eagle Cotton Oil Co. vs. Southern Railway Company,* and is reported in 51 Fed. (2d). 443.

We would direct this court's attention particularly to the concurring opinion of Judge Hutcheson in this case, in which he considered the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case and said:

> "In the opinion of the Circuit Court of Appeals in Atchison, Topeka & Santa Fe vs. Arizona Grocery Co., 49 F. (2d) 563, 568, holding that the Commission could not award reparation as to the rates specifically theretofore prescribed by it, it is said that under such circumstances 'The shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered.'
>
> "In my opinion this will not do. This is indeed the remedy, and the only remedy the shipper has under the state systems. This is, however, not the case under the federal system. Here the remedy is simpler, more efficacious, more reasonable, more just to shipper and carrier alike, and more consonant with the experimental character of rates and ratemaking. This system permits rates to be experimentally laid down and experimentally tried out. It

preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

"This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary inequalities and imperfections of this rate structure.

"For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant."

The interpretation of the Transportation Act by Judge Hutcheson, as above set forth, is diametrically opposed to the interpretation placed upon the Act by Judge Wilbur. In the present case, all shipments made by the petitioner upon which reparation was allowed were made between the date of the filing of the complaint charging

the reasonableness of such rates and the date upon which the Commission finally determined such complaint. This is admitted by the respondent carriers. Under Judge Wilbur's decision the petitioner is deprived of recovery from the carriers, regardless of how unreasonable the rate may have been during this period. Under Judge Hutcheson's opinion the petitioner would be allowed to recover the damages sustained by reason of the payment of unreasonable rates. We submit that the opinion of Judge Hutcheson is in accord with the spirit and intent of the Interstate Commerce Act, while that of Judge Wilbur is violative of both.

6. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED UPON AN IMPLIED RESTRICTION IN THE POWER OF THE INTERSTATE COMMERCE COMMISSION. THE PROVISIONS OF THE ACT DO NOT JUSTIFY SUCH IMPLIED RESTRICTION.

Judge Wilbur's decision is founded upon an implied restriction in the power of the Interstate Commerce Commission. Congress has not seen fit to limit specifically the power of the Interstate Commerce Commission in the manner in which it is restricted by the decision of the Circuit Court of Appeals in the present case.

As originally enacted, the Transportation Act made it the duty of the carriers to charge just and reasonable rates and to give to every shipper injured by any violation in that respect a remedy by complaint before the Commission. The Commission has always had the power to

determine and award damages in such cases. Since this act was originally enacted the Commission's power and jurisdiction have been greatly enlarged, but never have the carriers been relieved of the duty placed upon them by the common law, and as re-stated in Section 1 of the Act, to keep their rates just and reasonable. Neither has the Commission ever been relieved of its duty to hear and determine complaints against carriers alleging damages resulting from the failure to perform this absolute duty.

Certainly the carriers cannot successfully contend that a rate once prescribed will remain for all times just and reasonable. The fact that such rate may have been passed upon and approved by the Commission does not guarantee that such rate will be just and reasonable at all times thereafter or until changed by the Commission.

"Transportation conditions are not static; the oppressor of today may tomorrow be the oppressed."
Skinner and Eddy Corp. vs. U. S., supra.

The Commission has also many times recognized this principle.

"A rate which is reasonable today may tomorrow, by reason of changing circumstances and conditions, become unjust and unreasonable."
Topeka Traffic Assn. vs. A. & V. Ry. Co., 27 I. C. C. 428, 433.

Or otherwise stated:

"In numerous instances the Commission has held, in substance, that a rate may be reasonable at one

period of its existence and because of changed conditions and circumstances become unreasonable at a later period."

New Pittsburgh Coal Co. vs. H. V. Railway Co., 26 *I. C. C.* 121, 125.

Complaints filed before the Interstate Commerce Commission are not generally heard and determined in less than from two to six years. After they are filed and before they are determined it is apparent that a shipper can be damaged by a rate in violation of Section 1 of the Act, without any chance of recovery, if the opinion of Judge Wilbur is sustained. This was not the purpose or intent of the Transportation Act. The purpose of this act was to give to shippers and carriers alike a specialized tribunal which would determine the rights between them and which would see that the shipper secured a just and reasonable rate for the shipment of his goods and the carrier a fair return for its services. In fact, Judge Wilbur clearly recognized this purpose by the following statement:

"The whole purpose of the Act was to create and compel the enforcement, without discrimination, of rates which were just and reasonable." (R. 448).

As time goes on practically all rates in the United States will be at one time or another before the Interstate Commerce Commission. Under Judge Wilbur's decision such rates as are approved by the Commission will

be conclusively just and reasonable, until changed by subsequent order of the Commission, and this regardless of how seriously they violate Section 1 of the Act in their application because of changed conditions or peculiar circumstances. Otherwise stated, Section 1 of the Act will lose its binding force upon the carriers and will therefore become inoperative, regardless of how unreasonable and unjust the rate to the shipper may in fact become pending the time that such rate will be changed by the Commission for the future. Thus Judge Wilbur has concluded that a carrier may exact rates even though unjust and unreasonable, without violating the Interstate Commerce Act, provided only that the rates exacted do not exceed a level fixed by order of the Interstate Commerce Commission as a maximum level. Such a conclusion is directly opposed to the true relationship which should exist between common carriers and shippers as recognized by this court.

Dayton-Goosecreek R. Co. vs. U. S., supra;
S. P. Co. vs. Darnell-Taenzer Lumber Co., supra.

This court has further held that a carrier never acquires a vested right in a rate.

Skinner and Eddy Corp. vs. U. S., supra.

Furthermore, if Section 1 of the Act is to be given its true force and effect, then under Judge Wilbur's decision it would be necessary for the Commission to exercise constant supervision of all rates in the United States. It

would be impossible for any tribunal to survey all of such rates and keep them constantly upon a just and reasonable basis. In fact, such a burden could not be met by the Commission, for as the Commission itself said in an *amicus curiae* brief filed herein supporting the Petition for Writ of Certiorari, "It cannot in reason be asserted that the Commission is under the necessity of constant supervision and readjustment of thousands of rates, involving many carriers, to the end that when once established they be kept concurrently reasonable at all times. Surely Congress intended no such burden to be imposed, nor that shippers should be prejudiced by the failure of the Commission to be at all times reviewing established rates to determine their present reasonableness."

7. The Decision of the Circuit Court of Appeals in This Case Conflicts With the Principles of Interpretation and Application of the Interstate Commerce Act Previously Laid Down By This Court.

Judge Wilbur recognized that the opinion of the Circuit Court of Appeals in the present case was not in accord with an early decision of this court. His statement to this effect was as follows:

> "There are statements in the opinion of the Supreme Court in Reagan vs. Farmers L. and T. Co., 154 U. S. 362, 367, that militate against the views herein expressed." (R. 458).

The actual portion of the decision of this court to which he referred is as follows:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.* The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In Chicago, B. & W. R. Co. vs. Iowa, 94 U. S. 155 (24 L. Ed. 94), and Peik vs. Chicago & N. W. R. Co., 94 U. S. 164 (24 L. Ed. 97), the question of legislative control over railroads was presented, and it was held

that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control." (Emphasis supplied.)

Recognizing that the shipper now must file his complaint before the Commission and that the Commission in allowing reparation acts as a court, the above portion of the opinion is peculiarly applicable to the present case.

Judge Wilbur describes this portion of the opinion of the Supreme Court as dictum, and states that it is inconsistent with the theory of reparation for excessive or discriminatory rates stated in *Mitchell Coal and C. Co. vs. Pa. R. Co.*, 230 U. S. 247, 259.

As a matter of fact, an examination of this latter case relied upon by Judge Wilbur discloses that this court adopted the view regarding the allowance of reparation by the Commission urged herein by the petitioner. In the opinion of this case the court referred approvingly to an earlier decision of the Supreme Court, *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., supra.* This last case was decided in February, 1907, and in the opinion at page 442, the court said:

"Although an established schedule of rates may have been altered by a carrier voluntarily *or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal com-*

plaints, of awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Emphasis supplied.)

This decision was rendered at a time when the Transportation Act gave the Commission the right to hear complaints concerning the violations of the Act and to order carriers to desist from such violation in the future. This was stated by the court at the time as follows:

"Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and if the complaints were well founded, to direct not only the making of reparation to the injured persons, *but to order the carrier to desist from such violation in the future.*" (Emphasis supplied.)

Thus the Commission had the right under the Act at that time to allow reparation for the past and to order the carriers not to charge in the future rates in excess of that found reasonable.

As stated, the Abilene case was adopted and reaffirmed in the case of *Mitchell Coal and C. Co. vs. Pa. R. Co., supra,* cited by Judge Wilbur. The court not only affirmed the earlier decision but quoted with approval the portion of the opinion of the *Abilene* case, above set forth and then added:

"A contrary ruling would upset a useful, timesaving, economical, and established practice."

This last decision was rendered at a time when the Commission had the power to specifically prescribe a maximum rate as contained in the amendment of July 29, 1906, the same character of rate involved in the present case.

The respective rights of shippers and carriers were fully considered by this court in the Abilene case, supra. The court had before it in that case for the first time the question of procedure to be followed by a shipper who has paid an unreasonable rate. The court considered the question at length, in view of the provisions of the Act, and held that the shipper in such case must file his complaint before the Interstate Commerce Commission, attacking the established rate, and that the Commission in determining the questions presented by such complaint can ascertain if the shipper has been injured by the established rate, whether such established rate be one voluntarily fixed by the carriers or as the result of the enforcement of an order of the Commission. If the shipper has been damaged by the established rate regardless of how established, then the Commission has the right to allow reparation.

Furthermore, in interpreting the Interstate Commerce Act so as to hold the order of the Commission void in the present case, Judge Wilbur failed to consider a fundamental guide given to the courts for the proper interpretation of statutory provisions. It is admitted that the Act does not specifically restrict the Interstate Com-

merce Commission from allowing reparation when it finds a rate to be unreasonable because such rate is equal to or less than a previoously approved maximum rate—in the opinion of Judge Wilbur such restriction is placed upon the Commission only by implication. On the other hand, Section 1 places the duty on the carrier to charge just and reasonable rates and declares any unjust and unreasonable rate to be unlawful. A maximum rate order such as is here involved permits the carrier to charge a lesser rate without any violation of such order. This court and the Commission have held that a rate at one time reasonable does not remain such under changed circumstances and conditions. Sections 9 and 13 give the shipper a right to file a complaint before the Commission when the carrier violates the Act. Section 16 confers jurisdiction upon the Commission to allow reparation, if it finds such violation resulting in damage to the complainant. Thus we find in the provisions of these sections a logical construction justifying the order of the Commission in the present case. This court has established a principle of interpretation which fits the present circumstances.

"It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy."

Smith vs. Townsend, 148 U. S. 490.

Now let us apply this principle to the present case. This court has previously considered the purposes of the Interstate Commerce Act and the defects intended to be corrected by its enactment.

> "The principle objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation;—and to prohibit unjust discrimination."
> *I. C. C. vs. Baltimore R. Co.*, 145 U. S. 265.

Or otherwise stated:

> "The broad purpose of the Act was to compel the establishment of reasonable rates and uniform application."
> *Chicago & A. R. Co. vs. Kirby*, 225 U. S. 155.

Thus the principal object of the Act was to assure reasonable rates to the shipper, and the defect to be cured was the exaction of unjust and unreasonable rates. That the rates charged the petitioner were unjust and unreasonable *in fact* is conclusively determined by the finding of the Commission. No evidence to the contrary has ever been submitted by the carriers at any stage of these proceedings. Their only contention has been that such rates were conclusively just and reasonable, *not in fact*, but because the Commission prescribed a prior maximum rate a year and a half before the first shipment of sugar was made by the petitioner upon which reparation was allowed. Judge Wilbur's interpretation results in the Act defeating the very purpose for which it was passed and thereby failing to cure the defect intended to be remedied.

We therefore conclue that although the specific question here presented has not been before this court previously, earlier decisions of this court have established principles of application, construction and interpretation not in accord with the opinion of Judge Wilbur in the present case. This conflict requires the reversal of the decision of the Circuit Court of Appeals herein.

CONCLUSION

In conclusion the petitioner desires to point out that the decision of the Circuit Court of Appeals now before this court for review, rests upon three erroneous assumptions:

The first, that a maximum rate prescribed by the Commission relieves the carriers of the duty fixed by Section 1 of the Act;

The second, that in considering the question of reparation the Commission was conclusively bound by its prior order prescribing a maximum rate;

The third, that a carrier acquires a vested right to charge a rate even though unreasonable, if such rate is equal to or less than a prescribed or maximum rate.

No authorities sustain any of these assumptions. As to the first, if a maximum rate were identical with a fixed just and reasonable rate there would be no purpose or mean-

ing in *Section* 15 (1) of the Interstate Commerce Act providing for four types of rates: just and reasonable; maximum; minimum; maximum and minimum.

As to the second assumption, the petitioner submits that it is contrary to the entire purpose and intent of the Act, namely: the assurance to shippers of a just and reasonable rate. We believe that this assumption is contrary to the broad and salutary principles of construction and interpretation of the Interstate Commerce Act previously established by this court in the decisions cited in this brief. These decisions sustain the position of the petitioner and in addition set forth the procedure to be followed by a shipper when injured by an unjust and unreasonable rate. This procedure was followed by the petitioner in this case.

Third, as to the vested right of the carrier, no case has been cited by Judge Wilbur holding that a carrier has a vested right in any rate other than a just and reasonable rate. In *Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 140 *I. C. C.* 171, the Commission found that the petitioner had paid unjust and unreasonable rates, as shown by the evidence then before the Commission. The order in the case of *Phoenix Chamber of Commerce, et al. vs. Director General*, 62 *I. C. C.* 412, prescribing a maximum rate, did not give the respondents a vested right to charge an unreasonable rate. No court has ever held that a carrier has a vested right in a rate, even though such rate be equal to or less than a maximum rate order, where

such rate was in fact unjust and unreasonable. To compel the respondents to return any excess over a reasonable rate is not depriving them of property without due process of law but is in fact returning to the shipper illegal profits obtained by the carrier.

The decision of the Circuit Court of Appeals in the present case, holding that the Commission was without jurisdiction to make the award to the petitioner, rests upon no express provision of the Interstate Commerce Act or of any amendment thereto. Without such express provision we believe the opinion of Judge Hutcheson in the *Eagle Cotton Oil Company case, supra,* is more in line with the general principles of law when he states:

> "For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant."

We believe that Judge Hutcheson's opinion in the *Eagle Cotton Oil Company case, supra,* when applied to the [illegible] problems of rate making, will carry out the true intent and purpose of the Transportation Act, while on the other hand the opinion of the Circuit Court of Appeals in the present case will violate both its purpose and intent and will render the Commission powerless to

enforce the Transportation Act in the manner originally intended by Congress.

For the reasons set forth herein, we respectfully submit that this Honorable Court should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case.

Respectfully submitted,

SAMUEL WHITE,
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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 98

ARIZONA GROCERY COMPANY, a Corporation, *Petitioner,*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation, *Respondents.*

ARIZONA GROCERY COMPANY, a Corporation, *Petitioner,*
vs.
SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation, *Respondents.*

REPLY BRIEF FOR PETITIONER.

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INDEX.

	Page
Chronology	1
Criticism of Respondents' Conclusions	2
Attitude of Commission Towards Allowance of Reparation	11
Constitutionality of the Act if Construed as Insisted by Petitioner	12
Consideration of Cases Cited by Respondents	15

CASES CITED.

Alexander Sprunt & Son, Inc., v. United States, 281 U. S. 249	21
Anadarko Cotton Oil Co. v. A. T. & S. F. Ry., 20 I. C. C. 49	19
Atlantic Coast Line R. R. Co. v. Powe, 283 U. S. 401	15
Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479, 488	20
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156	15
Mills v. Lehigh Valley R. R. Co., 238 U. S. 473	13
Prentis vs. Atlantic Coast Line Co., 211 U. S. 210	7
Procter & Gamble Company v. United States, 225 U. S. 282	21
Sou. Ry. Co. v. St. L. Hay Co., 214 U. S. 297	13
Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 719	16

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SOUTHERN PACIFIC COMPANY, ET AL., *Respondents*.

REPLY BRIEF FOR PETITIONER.

CHRONOLOGY.

Beginning on page 1 of respondents' brief we find a chronology of the order of events in this proceeding. In this, however, the respondents have omitted to state that on November 3, 1922, a complaint was filed by Phoenix shippers challenging the reasonableness of the rates from California points to Phoenix, Arizona. (R. 277) This insertion should have been made between the dates of July 1, 1922, and February 21, 1923, shown in respondents' brief. In other words, this complaint was filed prior to the date of movement of the first shipment upon which reparation is sought by the petitioner in this case.

The three decisions of the Commission referred to in the chronology are contained in the Transcript of the Record beginning at pages 152, 166 and 182 respectively, and recite the pertinent facts from which its conclusions are reached. Examination of these decisions discloses many significant facts in the later decisions together with new developments justifying the conclusion that a lower maximum rate should have been applied under the changed conditions.

Criticisms of Respondents' Conclusions.

Respondents' brief, when analyzed, is based solely upon one proposition. This is stated by them on page 11 as follows:

> "The rates assessed and the charges collected upon petitioner's shipments were conclusively established as just and reasonable and in conformity with the requirements of the Interstate Commerce Act and of the Commission's valid findings and valid continuing order."

Respondents then proceed to state that

> "The Commission's findings and order in the First Case were continuously in effect without modification through the entire period of movement of the shipments upon which reparation is sought by petitioner;"

but respondents must remember that Sec. 1 of the Interstate Commerce Act was also continuously in effect without modification during this same period.

Respondents then continue on page 12 by saying that

"It seems quite clear that any rate which the carriers might establish not exceeding the maximum thus set was within the terms of the order and constituted full and complete compliance therewith."

Again respondents fail to state that the rate must not only comply with the order of the Commission, but that it must also comply with Sec. 1 of the Interstate Commerce Act.

On page 15 of respondents' brief they state that the voluntary publications of rates less than the reasonable maximum fixed by the Commission must have resulted in rates just as properly termed "Commission-made" as the exact rate named in the Commission's findings and order. If the Commission's order established a conclusively just and reasonable rate, and this is exactly what is insisted upon by respondents, then the action of the carriers in establishing a lesser rate was violative of such order. Respondents will doubtless agree that a rate less than just and reasonable is as much a violation of the Act as one which is more than just and reasonable for the former rate becomes a burden on other traffic and is violative of the Act.

On the other hand, the respondent carriers in this case recognized changes in conditions which warranted them in charging lower rates in 1922 and later years than the Commission found to be maximum reasonable rates in 1920 and 1921. They reduced the rate in July, 1922, and made a further reduction in January, 1924, recognizing the changing circumstances and conditions, and the question before the Commission in the later cases was not as to whether the rates charged by them in 1920, when the first complaint

was filed, were just and reasonable, but whether or not they had reduced them sufficiently under the changed conditions to comply with the requirements of Section 1 of the Act. The Commission and the District Court of Arizona found that they did not.

The carriers by admitting that they possessed the right under the maximum rate order to charge a lesser rate thereby admit that they could have charged 71 cents and 73 cents from southern and northern California points, respectively, without violating the Commission's order in the First Case. The question is whether under the changed conditions they should have done so. Under the law this question was for the Commission to determine.

Many of the statements in respondents' brief in attempting to analyze the effect of the order in the First Case are conflicting. First they insist that the order in the First Case conclusively prescribed a just and reasonable rate. (Respondents' brief, page 11) To support this statement respondents insist that the Commission *prescribed a rate of 96½ cents.* (Respondents' brief page 16.) Then, in opposition to these various statements, they admit that they could and did charge less. As a matter of fact the Interstate Commerce Commission did not prescribe an exact rate of 96½ cents. It is admitted by the carriers that this rate of 96½c was a maximum rate only (Respondents' brief p. 15) and we are at a loss to understand why they at the same time insist in their brief that an exact rate was prescribed. (Respondents' brief, p. 23)

Respondents labor heavily with the proposition that the petitioner insists that the Commission is em-

powered by law to prescribe and authorize a maximum rate which is nevertheless unlawful, that is, unreasonable, and that in rendering its decision in the First Case it undertook to perform that unlawful act. (Respondents' brief pages 23, 24.) This is not the position of the petitioner and nothing in the petitioner's brief leads to such a conclusion. Petitioner does insist, however, that while the Commission may have found at the time of the hearing of the First Case that 96½ cents was the maximum reasonable rate, the Commission did not prescribe this rate as the exact rate to be charged by the carriers but simply stated that any rate charged by the carriers must not exceed 96½ cents. We believe that it is logical to read into this order the requirement of Sec. 1 of the Interstate Commerce Act which places upon the carriers the continuing duty of maintaining just and reasonable rates. Thus the Commission at the time of the hearing established 96½ cents as the maximum reasonable rate. The act not only *requires the establishment* of a just and reasonable rate, but further *requires the carriers to maintain* a just and reasonable rate.

There are many illustrations in the respondents' brief of their inaccuracies and conflicting statements in respect to the character of the order in the First Case. On page 23 of their brief they state

> "The Commission's order * * * was an order *fixing* a reasonable rate."

This is wholly inaccurate and diametrically opposed to their earlier admission that the Commission's order only prescribed the maximum rate and did not *fix* the

rate. On this same page of respondents' brief in considering the First Case they insist that the rates established by the carriers under this order "stood unchallenged." Of course this is wholly incorrect when the record is examined and we find that a complaint was filed by Phoenix shippers on November 3, 1922, challenging the reasonableness of the rates then in effect.

On page 26 of their brief the following appears:

> "Petitioner nevertheless insists that Sec. 15 (1) of the act is to be interpreted as authorizing the Commission to prescribe a maximum rate which may lawfully exceed the absolute level of a just and reasonable rate."

This is subject to the same criticism previously made herein; namely, that while the maximum rate allowed by the Commission at the time of the first hearing may have been the just and reasonable rate, it does not necessarily follow that *this maximum rate* continued as the just and reasonable rate in all the years that followed.

The respondents then consider several cases of the Commission and of this Court, and of other Federal courts, holding that it is the duty of the Commission, upon the filing of a complaint to determine the just and reasonable rates. None of these cases holds that such determination relieves the carriers thereafter of the continuing duty of Sec. 1 not only to establish just and reasonable rates, but to maintain just and reasonable rates as required by that section.

Respondents, on page 35 of their brief, insist that the language of the finding of the First Case is substantially the same as that used in the Third Case

upon which reparation was allowed. Of course, there is a vital difference between the prescription of a rate for the future and the allowance of reparation for the past. The Commission in determining the reasonableness of a rate can not foresee changed circumstances and conditions, and we believe that it is for this reason that it is the Commission's practice to prescribe a maximum rate which permits the carrier to reduce such rate without further order of the Commission when conditions and circumstances warrant such reduction. On the other hand, in determining the reasonableness of a rate for the past, the exact circumstances and conditions existing at the time the rate was charged are before the Commission and are not subject to change. Thus the Commission can fix and determine the exact rate which is just and reasonable during the past period under consideration. In other words, the legislative action of the Commission looks to the future, the conditions and circumstances of which are unknown, while the judicial considers the past, the conditions and circumstances of which are known. *Prentis vs. Atlantic Coast Line Co.*, 211 U. S. 210.

The following statement appears on page 40 of respondents' brief:

> "* * * it necessarily and logically follows that the rates thus published by respondents and applied to petitioner's shipments were both *in fact* and in legal contemplation conclusively established as just and reasonable and in conformity with the requirements of the act."

This conclusion as to just and reasonable "in fact" is inaccurate, in view of the finding by the Commis-

sion in the Second and Third Cases and by the District Court for the District of Arizona in the present proceeding that the rates charged from 1923 to 1925 were *in fact* unjust and unreasonable. The facts referred to in the Commission's first decision were those facts shown to exist in 1920 and 1921.

The respondents, in insisting upon the validity of their rates, on page 43 of their brief, make this statement:

> "Indeed it has never been alleged and it is not now contended that that decision was not valid and lawful in every respect."

It is not the decision in the First Case which is here in question, but the rates which were charged the petitioner by the respondent carriers under the changed conditions in later years. If such rates were invalid because unjust and unreasonable in 1923, then the petitioner, under the provisions of the Interstate Commerce Act, is entitled to reparation, even though they may have been reasonable in 1920 and 1921.

The carriers, in attempting to sustain their position, would lead this Court to believe that if they had charged 71 cents and 73 cents for the shipments made by the petitioner, they would have incurred heavy and severe penalties. (Respondents' brief, page 48.) This is wholly inaccurate, for the actions of the carriers themselves are in conflict with this statement, for they later *voluntarily* reduced the rate as low as 84 cents, as contrasted with the maximum rate order of 96½ cents. In addition, we find this statement:

> "It would be nothing less than a paradox—an utter monstrosity—for Congress to have con-

ferred power upon the Commission to substitute its judgment for that of the carriers and to prescribe with conclusive effect the levels of rates for the future; and with the same enactment to provide that shippers might recover damages in subsequent collateral proceedings before the Commission." (Respondents' brief, page 48.)

No attempt was made by the Commission in the First Case to substitute its judgment for that of the carriers, other than to order them not to exact a rate in excess of 96½ cents. We submit that the changing of the rate voluntarily by the respondents to 86½ cents and then to 84 cents certainly required some act of judgment on their part. Thus the very action of the carriers shows that they did not consider that the judgment of the Commission was intended to be substituted for their own or that by establishing a lower rate any heavy or severe penalties would be exacted. This fallacious reasoning prevails throughout the brief of the respondents, in which they insist at many places and in many ways that the order in the First Case was continuously conclusive. (See particularly pages 49 and 50, Respondents' brief.)

That changed conditions and circumstances might warrant a different rate is admitted by the carriers. (Respondents' brief, pages 50-51.) To excuse their position they attempt to show the inequity which might occur if changed conditions would warrant an increased rate. In this connection they fail to call to the Court's attention the provision of Sec. 15 (7) of the Interstate Commerce Act, which gives to the carrier the right to ask for an increased rate and to secure such increased rate in a summary manner.

Under this section the Interstate Commerce Commission can only suspend the establishment of an increased rate for a period not exceeding 7 months, and if by that time a hearing has not been held, the increased rate will automatically go into effect. In addition, the act provides, in this same section, that when such increased rate is requested by the carrier,

> "The Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." (Title 49 U. S. C. A. Sec. 15 (7))

Thus the carrier is afforded a speedy and efficient method for securing an increase of rates. No such relief is afforded the shipper to secure a reduction of rates, but the shipper is granted the right under the provisions of the act to file a complaint before the Commission alleging the unreasonableness of rates charged and, if the Commission finds such to be true, to allow the shipper damages for the exaction of such unreasonable and unjust rates. These two corresponding rights of carrier and shipper clearly show the intention of Congress to protect both; the carrier in securing a fair return on its investment, and the shipper in securing a just and reasonable rate on all of its shipments.

There is nothing unfair, therefore, in requiring the carriers to keep their rates just and reasonable, since they are in a better position to determine changed circumstances and conditions, including the cost of their own operations. Under the maximum rate order of the Commission in the First Case, the carriers could have reduced without violating such

order the rates to such level as was just and reasonable. If, on the other hand, changed conditions and circumstances would have warranted an advance in rates over the maximum prescribed by the Commission, Sec. 15 (7) gave them a method in which to speedily secure such advance.

Attitude of Commission Towards Allowance of Reparation.

Respondents dealt at length with the fact that the Interstate Commerce Commission had several times requested Congress to relieve it of the burden of reparation. (Respondents' brief, 101-105.) When we consider these reports it becomes perfectly clear that Congress has sanctioned and approved the interpretation of the Interstate Commerce Act adopted by the Commission in allowing reparation upon rates found unjust and unreasonable, even though such rates were equal to or less than rates formerly considered or approved by the Commission. On page 104 of respondents' brief a portion of the 1930 report is quoted and reads as follows:

> "At present the cause of action accrues upon delivery or tender of delivery of the property by the carrier and, with certain exceptions, complaints must be filed within two years thereafter, except for overcharges, for which the period is three years. But now that we have been granted quasi-legislative power to prescribe just and reasonable rates for the future, and the rate structure of the country is so largely that which has come out of many formal proceedings before us, over a long period of years, we are of the opinion that these statutory periods should be substantially reduced."

Thus the Interstate Commerce Commission specifically brought it to the attention of Congress in this report that under its existing practice it is called upon to allow reparation on rates which had previously been considered by the Commission in prior "formal proceedings." Yet, after this specific request on behalf of the Commission that the statutory period for allowing reparation be reduced under such circumstances, Congress took no action and made no attempt to limit or remove the power of the Commission to grant reparation in cases identical with the one presented to this court. We therefore conclude that Congress has approved the interpretation of the act adopted by the Commission and the portion of the 1930 report quoted by respondents and herein above set forth sustains the position of petitioner.

Constitutionality of the Act if Construed as Insisted by Petitioner.

Respondents insist that if the act were construed in the manner insisted upon by petitioner, it would to that extent be unconstitutional and void and in contravention of the due process clause of the Fifth Amendment. (Respondents' brief, page 86.)

This contention ignores the character of the reparation order made by the Commission in the Third Case, upon which the present action is founded. This order of itself is not a judicial determination by any court. At most it only constituted *prima facie* evidence as to the question of justness and reasonableness of the rates charged the petitioner, and the respondents were not deprived of the right to show that the rates actually charged the petitioner were in fact just and reasonable. (Title 49 U. S. C. A. Sec. 16 (2)).

This Court has recognized that a reparation order is unenforcible except by action in court and that Sec. 16 (2) merely establishes a rule of evidence and that a reparation order does not possess the attributes of a court order. *Mills v. Lehigh Valley R. R. Co.*, 238 U. S. 473; *Sou. Ry. Co. v. St. L. Hay Co.*, 214 U. S. 297.

If the rates of 71 cents and 73 cents, found by the Commission in the present case to be the just and reasonable rates, resulted in confiscation of respondents' property because such rates were not the just and reasonable rates, respondents had the right to show such facts at the time this case was heard in the District Court.

> "This provision (Sec. 16 (2)) only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents, nor does it in any wise work a denial of due process of law." *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 430.

This Court has recently recognized the right of a shipper to a just and reasonable rate and considered the character of a reparation order of the Interstate Commerce Commission.

> "The Act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent evasion of the rule that every charge for transportation shall be just and reasonable. The collection by a common carrier of exorbitant charges

is a tort. (Smith vs. Chicago & Northwestern Railway Co., 49 Wis. 443, 5 N. W. 240). Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff * * *."

"The Act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all excessive, a condition precedent to suit."

"But no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable." *Lewis-Simas-Jones Co. v. Southern Pacific Company,* 282 U. S. 654.

Petitioner therefore submits that no evidence having been introduced by the respondents showing that the rates of 71 cents and 73 cents were not just and reasonable *in fact* and the statute having made the findings and order of the Commission *prima facie* evidence, the District Court properly found that the rates charged by the respondent carriers were unjust and unreasonable and that the just and reasonable rates which should have been charged were 71 and 73 cents from southern and northern California, respectively. (R. 370) This for the first time became a judicial determination that the rates were unjust and unreasonable. Under this procedure the carriers were not deprived of the right to test the correctness of the rates found by the Commission to be just and reasonable, and they can not therefore com-

plain at this stage of the proceedings that they will be deprived of their property without due process of law.

Consideration of Cases Cited by Respondents.

Respondents cite the case of *Atlantic Coast Line R. R. Co. v. Powe,* 283 U. S. 401. This case dealt with an order of the Railroad Commission of South Carolina prescribing a general rule that semaphore standards and similar structures should not be placed nearer than four feet from the outer edge of the rail. The semaphore in question in that case was some 4 feet 10 inches from the top of the rail. The court held the carrier not liable for damages because of the order of the Commission. This case is not analogous or helpful in the present matter. The safety of the location of a semaphore standard or similar structure would not be affected by subsequent changing circumstances and conditions. Respondents will agree with us, however, that a rate, just and reasonable today, may easily become an unjust and unreasonable rate tomorrow or a year from today, by reason of changed circumstances and conditions. Thus the case cited by respondents dealt with a situation wholly dissimilar to the one here presented.

The case of *Keogh v. C. & N. W. Ry. Co.,* 260 U. S. 156, cited by respondents at page 60 of their brief, does not dealt with the question of just and reasonable rates. In this case the shipper was insisting that he was entitled to competitive rates. This is clearly shown by the following quotation from the opinion of Justice Brandeis in that case.

subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules and regulations, in lieu of those complained of," to be observed.

Section 10423 provides that the order in the proceedings outlined in 10422 shall take effect twenty (20) days after service on the parties except where otherwise provided.

Section 10432 provides that the Commission may after notice and opportunity to be heard, as in the case of complaints, rescind alter or amend any prior order and that such later order "shall, when served upon the public service company affected, have the same effect as herein provided for original orders and rules."

It will be observed that these provisions confer upon the Washington Commission authority to designate the rate to be charged or the rule to be fixed. In the case referred to as shown by the findings at page 391 of the decision, the Commission on April 18, 1921, established a distance scale of rates on fuel wood in carload lots and it ordered that the charges should be determined by "taking as a basis a cord of 128 cubic feet." This order purported to operate prospectively and became effective about July, 1921. On March 17, 1922, the Commission changed its order, presumably under authority of Section 10432, after further hearing, and provided that where fuel wood was thrown loosely into the car the charges should be determined by using 192 cubic feet to the car which order was to become effective July 1, 1922. This order also operated only prospectively. Later the Commission undertook to award reparation to a ship-

per who made shipments between the effective dates of the two orders. The court pointed out "that the orders of the Department were prospective and in no way retroactive by their own terms." Furthermore, an exact rate was fixed as the Commission had authority to do making the case somewhat analogous to rates that are fixed under the statutes of other states such as Texas. At any rate, these provisions are so different from those in the Interstate Commerce Act that the determination of this question by the Washington State court can have little weight in the consideration of the interpretation to be given the Federal Act.

At page 110 of brief for respondents it is asserted that the shipper's rights are safeguarded where the carrier charges a rate "conforming to a valid and continuing determination by the Commission." This is but a repetition of the proposition stated on page 40 of respondents brief that the finding as to whether or not a rate is reasonable is a question of fact which when found becomes conclusive thereafter. That it may be conclusive at the time of the finding is hardly open to question but that it may be conclusive at some subsequent time does not follow. This is demonstrated by the quotation in the footnote at page 110 of respondents brief, from *Anadarko Cotton Oil Co. v. A. T. & S. F. Ry.*, 20 I. C. C. 49. The quotation given includes the following significant sentence:

> "The test of reasonableness can be applied only by reference to and upon consideration of *all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time.*" (Italics ours)

The Supreme Court cited this sentence with approval in the case of *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 488. In the latter case the Commission had awarded reparation for the past and reserved the matter of fixing rates for the future for a later decision. The court emphasized the broad distinction between the two functions but at the same time recognized that because of changes in conditions entirely different rates might be prescribed for the future from those upon which reparation should be awarded for the past. The court said that "there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing." Referring to the particular shipper who was seeking damages for unreasonable rates charged in the past we quote the following significant passage from the decision of the court:

> "He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in a position to say with certainty that the rates had been unreasonable, and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding, and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions."

Quite a similar line of reasoning applies in construing the purpose of Congress with respect to the

authority of the Commission to fix reasonable rates for the future as contrasted with its power to award damages for charging unreasonable rates in the past. The Commission may prescribe a reasonable rate for the future which determination may be based upon insufficient evidence or no evidence. The carrier if adversely affected thereby has a right of appeal under the law but the shipper in such case has no right of appeal to the courts but must content himself with a further petition to the Commission to reconsider the subject. The decision of the Commission is final so far as he is concerned either upon the original or the subsequent determination and his only right is to ask for further consideration by the filing of an additional complaint or motion for reconsideration of the case in question. *Alexander Sprunt & Son, Inc. v. United States,* 281 U. S. 249; *Procter & Gamble Company v. United States,* 225 U. S. 282. In the meantime he may be required to pay charges which were authorized by the former decision but which upon a more complete showing are found to be unlawful. It is a well known fact that frequently such rate investigations run over a period of years and the shipper would therefore be left remediless even though it should be found that the Commission had made an erroneous determination in its original proceeding.

This limitation upon the right of the shipper exists both in the case where he complains of rates and asks for reduced rates for the future and in the case where he complains of rates previously charged and asks for reparation as to the past. If reparation is denied he has no further recourse but, on the

other hand, if it is awarded, the carrier does not have to pay the damages but may force the shipper to go into court where the carrier has a right to a trial *de novo* and have its day in court.

As pointed out in brief for the Interstate Commerce Commission filed herein (page 9) the language of the statute in fixing the absolute duty upon the carriers to charge just and reasonable rates placed a continuing duty upon them from which they are not absolved by the mere fact that at some prior time the Commission had found the rates to be maximum reasonable rates. As stated in the brief:

> "A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being litigated before the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award."

The situation is in no wise analogous to that referred to as existing in the several states where the shipper is given a right of appeal from determinations made by the state regulatory bodies.

Another absurd result which would follow the interpretation of the statute as made by the Court below, relates to the effect of the decisions of the Commission where shippers attack rates as being unreasonable and the Commission finds that the evidence submitted does not show the rates to be unreasonable. Many thousands of complaints are filed with the Commmission by shippers alleging that given rates are unreasonable. The Commission is given no power to make a finding condemning a rate

unless it is supported by substantial evidence. In numerous cases the presentations by shippers unfamiliar with all the facts do not present substantial evidence and it is the Commission's duty to find that the rates have not been shown to be unreasonable and to dismiss the complaints. Thus the existing rates are approved although upon a more complete showing the Commission may find that the rates have been shown to be unreasonable and condemn the same. The doctrine advocated by appellees would thus protect the carriers in a case where fragmentary and incomplete evidence is presented to the Commission even though the carriers should be in possession of ample facts to demonstrate the unlawfulness of the rates. The acts of the Commission must be determined by the evidence before it in each case and therefore cannot be given the sanctity of an absolute legislative act which is not confined to the evidential showing to justify its passage. For this reason such acts of the Commission are considered as quasi legislative acts as contrasted with the absolute legislative acts of Congress. The respondents quote the report of the Commission to Congress in 1930 to the effect that "the rate structure of the country is so largely that which has come out of many formal proceedings before us, over a long period of years." If this court should adhere to their interpretation of the law all future proceedings seeking to obtain reparation could be substantially delayed through ingenious devices of carrier counsel while they rested secure from any liability for damages where any such rates have in fact become unlawful in the interim. We submit that such an absurd result cannot be had by implication

and that before such a result should follow there should be clear and explicit language in the statute to require it.

Respectfully submitted,

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"The case is presented on the pleadings. Whether there is a cause of action under Section 7 of the Anti-Trust Act, is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the act to regulate commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates and he has been damaged thereby and he is entitled to recover."

This court simply held in the Keogh case that under the Interstate Commerce Act a shipper is only entitled to just and reasonable rates. The petitioner in the present case stands before this Court asking for the enforcement of this right.

On page 65 of respondents' brief the case of *Winsor Coal Co. v. C. & A. R. Co.*, 52 Fed. 719, is cited as an authority sustaining their position. The opinion in that case sustains the argument advanced by petitioners; for it clearly points out that the Missouri Railroad Commission had placed upon it the specific duty to see that all rates were just and reasonable, as shown by the following excerpt:

"It shall be the duty of the railroad commissioners to see that all schedules of rates adopted by common carriers are reasonable and just.

"Throughout the entire act it is clear that it was the legislative mind to impose upon the chosen agents of the state—the railroad commissioners—the duty of supervising and regulating the rates charged by such carriers and to ascertain and declare from time to time as the changing conditions of trade and commerce might suggest what as between shipper and carrier is a reasonable and just rate of compensation.

"In the absence of any affirmative action by the commissioners the intendment of law, arising from the legal presumption that public officers performed their duties, should be that no complaint had arisen of unjust charges or that the commissioners, who are presumed to be in possession of the schedule adopted by the carrier, deem the maximum fixed by the carrier and the legislator to be reasonable and just." *Winsor Coal Co. v. C. & A. R. Co.*, 52 Fed. 716, 719, 720.

No such duty is placed upon the Interstate Commerce Commission by the Federal act. This duty is placed entirely upon the carriers. The respondents have attempted to read into the Federal act the provisions which were specifically set forth in the Missouri act.

Among the cases cited by appellees is that of Northern Pacific v. Department of Public Works in the State of Washington, 136 Wash. 389 (240 Pac. 362) discussed at pages 66 to 71 of brief for appellees. There are some considerations affecting this decision which are not set forth in the brief for appellees. For example, Section 10393 of the Revised Statutes of Washington provides that the Department (being the regulatory commission) may "establish and fix a joint rate which will be fair, just, reasonable and sufficient" to be charged in the future.

Article 10422 deals with complaints and the authority of the Commission with respect thereto. It provides that after complaints have been filed or upon the complaint of the Commission upon its own motion, "the Commission shall have power, after notice and hearing as in other cases, to, by its order,

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. [redacted] 98

Office Supreme Court,
FILED
JUN 24 19
CHARLES

ARIZONA GROCERY COMPANY,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.,
Respondents.

ARIZONA GROCERY COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY ET AL.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

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Index

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. The decision of the Circuit Court of Appeals is not erroneous in the respects asserted by the petitioner, or otherwise	7
1. The Circuit Court has correctly concluded that the rates and charges applied upon petitioner's shipments, having been in conformity with the Commission's order in the First Case, were conclusively established as just and reasonable; and that the respondents, in maintaining and applying such rates, fulfilled their duty under the Interstate Commerce Act to maintain and apply just and reasonable rates and charges	7
2. The Circuit Court of Appeals correctly concluded that the Act does not confer upon the Commission jurisdiction to award reparation for the collection of rates lawfully published in compliance with the Commission's prior formal findings and orders	13
3. The Circuit Court of Appeals has correctly concluded that if the Act were to be construed as conferring jurisdiction upon the Commission to award reparation against commission-made rates, it would to that extent be unconstitutional and void, in that it would operate to deprive the respondent carriers of property without due process of law	18
II. While this Court has never directly decided the precise question of federal law here involved, it has done so indirectly in a number of cases. The Circuit Court's decision is squarely in accord with the controlling pronouncements of this Court	21

Page

III. The decision of the Circuit Court does not deny petitioner any property right, or its property without due process of law 26

IV. While the issue involved in the case at bar is of considerable importance, there is no necessity for any further pronouncement by this Court with respect thereto 29

CONCLUSION 31

Table of Cases Cited.

	Pages
A. C. L. R. Co. v. Powe, 75 L. ed. Adv. Ops. 721	17
Ann Arbor R. R. Co. v. U. S., 281 U. S. 658, 668	10, 18
A. T. & S. F. Ry. Co. v. United States, 234 U. S. 294, 311	13
A. T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221	10
Baer Bros. v. D. & R. G. R. Co., 233 U S. 479, 486	19
Blodgett v. Holden, 275 U. S. 142	20
Bonfils v. Public Utilities Comm., 67 Colo. 563	17
Calder v. Bull, 3 Dallas (3 U. S.) 385	20
C. R. I. & P. Ry. Co. v. U. S., 274 U. S. 29	11
Fletcher v. Peck, 6 Cranch (10 U. S.) 87, 135	20,
Harriman v. I. C. C., 211 U. S. 407, 422	18
Hurtado v. California, 110 U. S. 516, 535	20
I. C. Act, Secs. 8, 9, 16(1) (49 U. S. Code 8, 9, 16(1))	15
I. C. C. v. Diffenbaugh, 222 U. S. 42, 47	10
I. C. C. v. U. P. R. R. Co., 222 U. S. 541, 547	12
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156	16, 21
L. & N. R. Co. v. Garrett, 231 U. S. 298, 305	19
Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608	17
Mellon v. World Publishing Co., 20 Fed. (2d) 613	11
Miller Mill Co. v. L. & N. R. Co., 207 Ala. 253	17
Miller, Legislative Evolution of Interstate Commerce Act, pp. 138-140	11
M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680	17
M. K. & T. Ry. Co. v. I. C. C., 164 Fed. 645, 648	10
Mitchell Coal Co. v. Pa. Ry. Co., 230 U. S. 247, 259	25
Montrose Oil Refining Co. v. St. L.-S. F. Ry. Co. et al., 25 Fed. (2d) 750	11

	Page
News Syndicate Co. v. N. Y. C. R. Co., 275 U. S. 179, 187	15
N. P. Ry. Co. v. Depart. of Public Works, 136 Wash. 389	17
Philips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 665	25
Prentis v. A. C. L. R. Co., 211 U. S. 210, 226	15
Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362	23
Scott v. McNeil, 154 U. S. 34	28
Skinner & Eddy Co. v. United States, 249 U. S. 557, 562	25
S. P. Co. v. I. C. C., 219 U. S. 433, 443	10, 21, 22
34 *Stat.* 589 (Hepburn Act of June 30, 1906, Sect. 4)	11
36 *Stat.* 551 (Mann-Elkins Act of June 18, 1910, Sect. 12)	11
41 *Stat.* 484 (Transportation Act of Feb. 28, 1920, Sect. 418	11
T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448	25
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059	17
Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412	2, 11, 12
Traffic Bureau, Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co., 95 I. C. C. 244	3, 11
Traffic Bureau, Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co. et al., 140 I. C. C. 171	4, 11, 12
Twining v. New Jersey, 211 U. S. 78, 101	20
U. S. v. N. Y. C. R. Co., 263 U. S. 603, 610	10
United States v. Mo. Pac. R. R. Co., 278 U. S. 269	30
Untermyer v. Anderson, 276 U. S. 440	20
Valley v. No. F. & M. Ins. Co., 254 U. S. 348	28
Virginian R. Co. v. U. S., 272 U. S. 658, 665	13
Webster v. Fall, 266 U. S. 507	25
Western Paper Makers' Chemical Co. v. U. S., 271 U. S. 268, 271	12
Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 716	17
Wolff Co. v. Industrial Court, 267 U. S. 552	25
Young Co. v. Payne, 127 Miss. 48	17

In the Supreme Court
OF THE
United States

October Term, 1930

No. 983

Arizona Grocery Company,
Petitioner,
vs.
The Atchison, Topeka & Santa Fe Railway Company et al.,
Respondents.

Arizona Grocery Company,
Petitioner,
vs.
Southern Pacific Company et al.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

Preliminary Statement.

The essential issue here presented is whether the Interstate Commerce Commission is empowered, by

the Interstate Commerce Act, to make a valid order awarding reparation (i. e., damages), on account of the collection, by carriers subject to the Act, of rates equal to or less than those which the Commission has itself directly prescribed or approved, by a prior formal valid continuing order. The Circuit Court of Appeals for the Ninth Circuit has declared, in the decision (48 Fed. (2) .....; R. 438-462) which petitioner seeks to have reviewed, that the Commission has no such power, and that a purported order for the payment of reparation, made under such circumstances, is void and of no effect.

Statement of the Case.

The summary of the facts which appears in petitioner's statement of the case (Petition, pp. 2-4) is neither complete nor wholly accurate. The essential facts are, however, set forth quite fully in the Circuit Court's opinion (R., 438-453). Briefly summarized, they are as follows:

On June 22, 1921, in response to a complaint filed by various shippers (including petitioner's predecessor), the Interstate Commerce Commission rendered its decision entitled

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412.

In that decision (hereinafter referred to as the *First Case*) the Commission found that, for the fu-

ture, reasonable rates on sugar, in carloads, from all points in California to Phoenix, Arizona, should not exceed 96½ cents.[1] The defendant carriers were ordered to establish, on or before September 17, 1921, and thereafter to maintain until the Commission's further order, rates not exceeding the figure named. A copy of the Commission's opinion and order is embodied in the Record (R., 223-275). The carriers complied with the order in the *First Case* by establishing (September 17, 1921) a rate of 96 cents. That rate was afterwards twice voluntarily reduced: first to 86½ cents (July 1, 1922), and later to 84 cents (January 10, 1924).

On January 6, 1925, in response to a complaint filed on November 3, 1922, by various shippers (not including petitioner), the Commission rendered its decision in the so-called *Second Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co.*, 95 I. C. C. 244.

In that decision the Commission found that the rate of 84 cents then in effect on sugar from California points to Phoenix was, and in future would be, unreasonable, and ordered rates not exceeding 71 cents to be established effective February 25, 1925. The opinion and order in the *Second Case* are reproduced in the transcript (R., 276-290). The order was duly complied with, the 71-cent rate becoming effective on the date mentioned.

(1) All rates herein are stated in amounts per 100 pounds.

The Commission also undertook to *find,* in the *Second Case,* that reparation was due upon shipments of sugar moving prior to the effective date of its order, and during the period when the order in the *First Case* was still in effect; but no *order* for the payment of reparation was actually made. The *Second Case* was subsequently reopened, and consolidated with a number of other cases in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, in the so-called *Third Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., et al.,* 140 I. C. C. 171.

In that decision the Commission modified its conclusions in the *Second Case* with respect to future rates, by prescribing a rate of 73 cents from Northern California points to Phoenix, instead of the 71-cent rate previously ordered. It did not attempt to make that finding retroactive. It did, however, undertake to find that rates which had been charged in the past, during the period preceding the effective date of the decision in the *Second Case,* and while the order in the *First Case* was still in effect without modification, had been unreasonable, and that petitioner and other shippers, who had made shipments under such rates and paid charges based thereon had been damaged, and were entitled to reparation, to the extent that the charges paid exceeded those which would have accrued under rates retroactively determined, by the findings in the

Third Case, to have been unreasonable. The opinion and order in the *Third Case* are likewise reproduced in the transcript (R., 290-309). Petitioner subsequently filed statements showing shipments which it had made, the rates assessed, the charges collected, and the amounts claimed as reparation under the findings in the *Third Case*. Thereupon the Commission issued its formal order (March 11, 1929), directing respondents to pay such reparation (R., 46-47).

All of the shipments as to which reparation was awarded moved during the period between February 1, 1923, and February 10, 1925. The charges thereon were based upon the rates of 86½ cents and 84 cents, successively in effect during that period, maintained by respondents in compliance with the order in the *First Case*, then outstanding and unmodified.

Respondents declined to comply with the reparation order of March 11, 1929; and petitioner thereafter brought two suits in the United States District Court for Arizona. These suits were consolidated, and submitted upon an agreed statement of facts (R., 254-319), to the trial court sitting without a jury. That court ruled that the reparation order sued upon was valid, overruling the opposing contention of the defendant carriers, and after making special findings of fact and conclusions of law (R., 355-375), rendered judgments for petitioner (R., 228-230). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments were reversed (R., 463-464),

that Court having concluded, as before stated, that the Commission's reparation order was void and of no effect.

Argument.

INTRODUCTORY.

The rules of this Court provide (Rule 38, par. 5-b) that a writ of certiorari to review a decision of a Circuit Court of Appeals will, in general, be granted only when at least one of six specified reasons is made to appear. Petitioner relies upon two of these only, viz.:

(i) That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; and

(ii) That the Circuit Court has decided a federal question in a way *probably* in conflict with applicable decisions of this Court.

Petitioner does not assert that the decision sought to be reviewed conflicts with any decision of another Circuit Court of Appeals, or that the Circuit Court has decided an important general legal question in a way which is untenable, or in conflict with the weight of authority. Moreover, the reasons urged are essentially inconsistent and self-contradictory. Obviously, if the question has not been settled, the Circuit Court's decision cannot be in conflict with any applicable decision of this Court.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT ERRONEOUS IN THE RESPECTS ASSERTED BY THE PETITIONER OR OTHERWISE.

Under the heading "Specifications of Error" (Petition, pp. 12-13), it is asserted that the decision of the Circuit Court is erroneous in various respects. Petitioner makes no attempt to support these assignments of error by either direct argument or reference to the authorities; it does not even undertake to associate the several assignments with any specified statements or conclusions set forth in the opinion of the Circuit Court. Petitioner has thus failed to conform to the requirements of Rule 27 of the rules of this Court, and its assignments of error should receive no consideration. Nevertheless, we believe it to be desirable to show, by reference to the opinion and the relevant authorities, that the Circuit Court has not erred, either as asserted by petitioner or otherwise.

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1. THE CIRCUIT COURT HAS CORRECTLY CONCLUDED THAT THE RATES AND CHARGES APPLIED UPON PETITIONER'S SHIPMENTS, HAVING BEEN IN CONFORMITY WITH THE COMMISSIONS'S ORDER IN THE FIRST CASE, WERE CONCLUSIVELY ESTABLISHED AS JUST AND REASONABLE; AND THAT THE RESPONDENTS, IN MAINTAINING AND APPLYING SUCH RATES, FULFILLED THEIR DUTY UNDER THE INTERSTATE COMMERCE ACT TO MAINTAIN AND APPLY JUST AND REASONABLE RATES AND CHARGES.

Petitioner's Assignments of Error Nos. 5 and 6 are apparently addressed to the Circuit Court's conclu-

sions: (1) that the unchallenged decision and order in the *First Case* constituted a conclusive determination by the Commission of a *reasonable* (not merely a *maximum*) future rate; (2) that respondents, having complied with that valid order during its entire effective period, and maintained and applied their rates in obedience thereto, did not violate the Act, but fulfilled their statutory obligation to maintain and charge reasonable rates upon petitioner's shipments moving during that period; and (3) that consequently the rates charged upon such shipments, and paid by petitioner, were not unreasonable, or otherwise in violation of the Act. It will be noted that petitioner does not contend that the order in the *First Case* was not in full effect, without modification, at the times its shipments moved; likewise, it does not dispute the fact that the rates applied on those shipments conformed to and complied strictly with that order.

The conclusions of the Circuit Court, which petitioner undertakes to challenge by these assignments, are expressed in the following portions (among others) of the opinion:

> "* * * We pause here to say that we are in accord with the apparent conclusion of the Commission that its order fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established and that the order of the Commission amounted to a decision

that rates fixed by the carrier below the maximum it had established were just and reasonable. It would be absurd, it seems to us, to say that the Commission was empowered to prohibit the further collection of a freight rate established by the carrier on the ground that it was unjust and unreasonable and to replace that rate with another rate which was also unjust and unreasonable, that is, not just and not reasonable. * * * Its power in the first place is to declare a rate unreasonable and unjust, and having so declared to replace it with a rate which is reasonable and just". (R., 446-447).

"The whole purpose of the act was to create and compel the enforcement without discrimination of rates which were just and reasonable." (R., 448).

"In view of the history of the legislation and its cardinal purpose it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate. In this connection it should be observed that in the numerous decisions by the courts considering the question of freight rates before the enactment of section 15 in its present form (February 28, 1920, 41 Stat. 484) the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable. No other thought has apparently entered the mind of the judges who are so frequently called upon to pass upon the power of the Commission under the Hepburn Act and the amendments thereto." (R., 450).

"The ascertainment of a maximum rate is in effect a decision that any rate below that maxi-

mum is reasonable as to the shipper, and that the carrier below that maximum can be trusted to fix a rate that is not too low to protect itself." (R., 462).

The conclusions of the Circuit Court, as set forth in the foregoing quotations and elsewhere in the opinion, are directly in accord with, and are sustained by, the following propositions and controlling authorities:

(a) **The primary issue presented, and necessarily decided, in the First Case was whether the rate in effect was unreasonable; and, if so, what a reasonable future rate would be.**

A. T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221.

(b) **The Commission had no power to prescribe a so-called maximum rate which was not just, reasonable, and otherwise lawful.**

S. P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 443;
I. C. C. v. Diffenbaugh, 222 U. S. 42, 47;
U. S. v. N. Y. C. R. Co., 263 U. S. 603, 610;
Ann Arbor R. R. Co. v. United States, 281 U. S. 658, 668;
M. K. & T. Ry. Co. v. Interstate Commerce Commission, 164 Fed. 645, 648.

A review of the legislative history of those portions of the Act which confer upon the Commission power to prescribe rates for the future will demonstrate that Congress has never contemplated that the Commission should have any power to prescribe a maximum rate

which is not, at the same time, conclusively just and reasonable.

34 Stat. 589 (Hepburn Act of June 30, 1906, Sect. 4);

36 Stat. 551 (Mann-Elkins Act of June 18, 1910, Sec. 12);

41 Stat. 484 (Transportation Act of Feb. 28, 1920, Sect. 418);

Miller, Legislative Evolution of Interstate Commerce Act, pp. 138-140.

(c) Orders of the Commission precisely similar in every essential to the order of the First Case have been held by this Court, and by the Circuit Courts of Appeal, to be orders prescribing reasonable rates.

C. R. I. & P. Ry. Co. v. United States, 274 U. S. 29;

Montrose Oil Refining Co. v. St. L.-S. F. Ry. Co., et al., 25 Fed. (2d) 750;

Mellon v. World Publishing Co., 20 Fed. (2d) 613.

(d) Both in the First Case itself, and upon subsequent review, the Commission has indicated that it regarded its action therein as the prescription of a reasonable rate.

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412 (R., 263-273);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 95 I. C. C. 244 (R., 285-288);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 140 I. C. C. 171 (R., 306-307).

(e) The essential language of the finding made in the First Case is the same as that employed in the finding in the Third Case. The petitioner's asserted right to reparation depends entirely upon the latter, which must be construed as a finding of reasonableness if petitioner's suit is to have any basis whatsoever. But if the latter is construed as a finding of reasonableness, the finding in the First Case must be given an identical construction.

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, 62 I. C. C. 412 (R., 273-275);

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 140 I. C. C. 171 (R., 307, 308, 314, 315).

(f) The Commission's determination whether a rate is reasonable is conclusive, if supported by substantial evidence, unless the Commission has acted in excess of its constitutional or statutory jurisdiction. Such a finding and order are not subject to collateral attack.

It is not contended that the Commission, in the *First Case,* was not proceeding strictly in accordance with the powers conferred upon it by law, or that its conclusion was not based upon substantial evidence. In short, it is not and has never been asserted that the findings and order in the *First Case* were invalid in any respect. They must therefore be accepted as valid, and as having conclusively established (as long as they continued without modification) the legal measure of rates which were just and reasonable, and in conformity with the requirements of the statute.

Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271;

I. C. C. v. U. P. R. R. Co., 222 U. S. 541, 547;

A. T. & S. F. Ry. Co. v. United States, 234 U. S. 294, 311;
Virginian R. Co. v. United States, 272 U. S. 658, 665.

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2. THE CIRCUIT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ACT DOES NOT CONFER UPON THE COMMISSION JURISDICTION TO AWARD REPARATION FOR THE COLLECTION OF RATES LAWFULLY PUBLISHED IN COMPLIANCE WITH THE COMMISSION'S PRIOR FORMAL FINDINGS AND ORDERS.

Petitioner's Specifications of Error Nos. 2 and 4 are addressed to the Circuit Court's conclusion that the Act does not confer jurisdiction upon the Commission to award reparation for the collection of rates published and maintained in conformity with a valid, continuing, effective finding and order of the Commission. That conclusion is expressed most directly in the following portions of the opinion:

> "The contention is that the Commission could revise its original findings as to what was in fact a reasonable rate because in the first instance it acted as a law-making body—a legislature—and in the second it acted in a judicial capacity—as a court. * * * What follows? Is it not true that a court is bound in its determination by the law? Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and

award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (sec. 16, subd. 1), delegating power to the Commission to award reparations, limits that power to parties 'entitled to an award of damages under the provisions of this chapter (act) *for a violation thereof.* * * *'. (Italics ours.) (See, also, Transportation Act, sec. 10, subd. 8.) Is the court (the Commission in its quasi-judicial capacity) to say that a carrier has no lawful right to collect a rate established by law (that fixed by the Commission acting in its quasi-legislative capacity), or, having collected it, to retain it? It is true that the original order is not res judicata, but its effect is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the legislature." (R., 451-452).

"When, however, in regularly pursuing its delegated power, the Commission establishes a specific rate as reasonable in fact, the legislative power has so definitely established the specific rate thus fixed as just and reasonable that there is no longer room for judicial decision as to what is a just and reasonable rate. Congress, through its agent, the Commission, has established the measure by which the reasonableness of the rate is to be judged. In considering an application for damages for charging unreasonable rates a court, or the Commission acting as such, must confine its inquiry to the other factors involved in an award of reparations, such as the amount of freight moved, the point of origin and of delivery, the

owner of the shipment, etc.; but if there is no excess charge there can be no award, for where the rate is one fixed by law it is not excessive in any legal sense." (R., 453-454).

The Court's conclusions upon this point are sustained by the following propositions and controlling authorities:

(a) **The Act confers jurisdiction upon the Commission to award reparation to a private party only when he is legally damaged by reason of a carrier's violation of the Act.**

News Syndicate Co. v. N. Y. C. R. Co., 275 U. S. 179, 187;

Interstate Commerce Act, Sections 8, 9, 16 (1) (49 U. S. Code 8, 9, 16 (1)).

Petitioner apparently agrees—at least, it does not oppose the proposition—that the Commission's power to award reparation is confined to those instances where it is shown that the asserted damage results from a carrier's violation of the Act.

(b) **The Commission, when it acts in a quasi-judicial capacity for the purpose of awarding reparation, must be bound, in the same manner as any other judicial tribunal, by the law and the facts as they existed at the time the asserted cause of action arose.**

Prentis v. A. C. L. R. Co., 211 U. S. 210, 226.

(c) The publication and assessment of a rate conforming to and complying with the Commission's specific order prescribing the reasonable maximum rate thereafter to be applied cannot be a violation of the Act, and therefore cannot give rise to legal damages.

Carriers are required, under pain of severe penalty, to comply with and obey orders of the Commission prescribing their rates (Interstate Commerce Act, Sect. 16, pars. 7, 8; 41 Stat. 492). If the Commission is empowered to award reparation for the collection of rates which it has prescribed, then we are faced with the extraordinary proposition that a carrier can be penalized, under the Act, for having done the very thing which it was compelled under heavy penalty to do. This Court has, however, held that no action against carriers for damages can be predicated upon the assessment and collection of rates authorized and approved by formal findings or orders of the Commission.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156.

While the *Keogh Case* did not involve the precise issue here presented, it did determine that there could be no legal damage, capable of recovery in an action at law, where the instrument by which the alleged injury was inflicted was the collection of the legal rate which had been approved and authorized by direct findings of the Commission.

Moreover, in a number of cases decided by state and federal courts, in which have been involved issues sub-

stantially identical with those presented in the instant case, the courts have unanimously declared and sustained the proposition that a regulatory body, authorized to prescribe rates to be charged by carriers subject to its jurisdiction, cannot award reparation for the collection of rates published and maintained in conformity with its valid decisions and orders. There is no reported decision holding to the contrary.

Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 716;
M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680;
Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608;
Miller Mill Co. v. L. & N. R. Co., 207 Ala. 253;
Young Co. v. Payne, 127 Miss. 48;
N. P. Ry. Co. v. Dept. Public Works, 136 Wash. 389;
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059;
Bonfils v. Public Utilities Comm., 67 Colo. 563.

Compare, also:

A. C. L. R. Co. v. Powe, ... U. S. ....., 75 L. ed. Adv. Ops. 721.

3. THE CIRCUIT COURT OF APPEALS HAS CORRECTLY CONCLUDED THAT IF THE ACT WERE TO BE CONSTRUED AS CONFERRING JURISDICTION UPON THE COMMISSION TO AWARD REPARATION AGAINST COMMISSION-MADE RATES, IT WOULD TO THAT EXTENT BE UNCONSTITUTIONAL AND VOID, IN THAT IT WOULD OPERATE TO DEPRIVE THE RESPONDENT CARRIERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner's third assignment of error is apparently addressed to the Circuit Court's conclusion that the Act, *if it should be construed as conferring upon the Commission jurisdiction to award reparation under the circumstances here presented,* would to that extent be unconstitutional and void, in that respondents' property would be taken without the observance of the due process of law guaranteed by the Fifth Amendment. The Circuit Court has not held, as petitioner asserts, that the Act *is* unconstitutional because it confers that jurisdiction; on the contrary, the Court has construed the Act as *not* conferring such jurisdiction, thus avoiding any necessity of calling its validity into question under the Constitution. In so doing, the Circuit Court has followed controlling pronouncements of this Court.

Ann Arbor Co. v. United States, 281 U. S. 658, 669 (already cited);

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422.

The conclusion to which petitioner's third assignment seems to be directed is contained in the following portion of the opinion:

"Indeed, although the appellee insists that the fixing of rates as a basis of reparation for past shipments is a judicial or quasi-judicial act, it would be better, perhaps, for its position if the act were legislative, for a legislative body, unlike a court, can establish the law retroactively unless prevented by constitutional limitations. * * *

"If the second fixing or refixing of the rate by the Commission as a basis for reparations is legislative, the only limits upon a retroactive act, other than the Constitution, would be the limitations of the Transportation Act defining the powers delegated to the Commission. The only constitutional restriction upon the legislative power to retroactively reduce rates suggested by the appellant is the constitutional prohibition against the taking of property without due process of law. That is, it is argued, the Commission, having established a legal and lawful rate, the freight charges thus fixed, allowed and collected become the property of the carrier and cannot by a new retroactive law be arbitrarily taken away by legislative fiat. This position seems to be well taken." (R., 454-455).

This conclusion is sustained by the following propositions and controlling authorities:

(a) The Commission, in awarding reparation, exercises a quasi-judicial function; when it prescribes or approves a reasonable rate for the future it acts in a quasi-legislative capacity.

Baer Bros. v. D. & R. G. R. Co., 233 U. S. 479, 486;

L. & N. R. Co. v. Garrett, 231 U. S. 298, 305.

(b) The Commission's order in the First Case having been made in the exercise of its legislative power, was conclusive until it was modified by the Commission's subsequent order, since its validity was never questioned. Charges collected by the defendants under the rates authorized by and applied in conformity with that order therefore became property vested in conformity with existing law, of which they could not be deprived by retroactive findings and orders of the Commission.

The undisputed facts show that the carriers sold their transportation services at prices less than the maximum authorized by the Commission, and collected the authorized lawful rates. Upon completion of the services, such funds passed into their possession and ownership, and became their vested property. That property could not afterwards be lawfully taken from them, even though the rate might be changed, as to its *prospective* operation, by the same agency which first authorized it. Neither Congress, nor the Commission, nor any other federal agency subject to the limitations of the Fifth Amendment, could make a valid *retroactive* decree, taking from the respondents the property which they had duly acquired, in accordance with the law contemporaneously in effect.

Fletcher v. Peck, 6 Cranch (10 U. S.) 87, 135;
Calder v. Bull, 3 Dallas (3 U. S.) 385;
Hurtado v. California, 110 U. S. 516, 535;
Twining v. New Jersey, 211 U. S. 78, 101;
Blodgett v. Holden, 275 U. S. 142;
Untermyer v. Anderson, 276 U. S. 440.

It may be noted that most, if not all, of these authorities are cited by the Circuit Court (R., 455).

II.

WHILE THIS COURT HAS NEVER DIRECTLY DECIDED THE PRECISE QUESTION OF FEDERAL LAW HERE INVOLVED, IT HAS DONE SO INDIRECTLY IN A NUMBER OF CASES. THE CIRCUIT COURT'S DECISION IS SQUARELY IN ACCORD WITH THE CONTROLLING PRONOUNCEMENTS OF THIS COURT.

It may be conceded, as petitioner asserts, that the instant proceeding involves an important question of federal law. But it does not necessarily follow that this Court is required to review the Circuit Court's decision. The precise question presented, though not heretofore directly passed upon by this Court, has been indirectly involved in a number of cases; and in each of those cases this Court has indicated views which directly support the conclusions of the Circuit Court of Appeals. In short, the important question of federal law here presented has been settled by this Court, indirectly at least; and the Circuit Court's determination is squarely in accord with applicable decisions of this Court.

Among the decisions of this Court which indicate that there can be no right to reparation, arising from the collection by interstate carriers of a rate published and maintained pursuant to the express approval and authority, and indeed the formal order, of the Commission, are:

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (already cited);

S. P. Co. v. Interstate Commerce Commission, 219 U. S. 433.

In the *Keogh Case,* this Court directly held that there could be no right of action for damages, predicated upon an asserted violation of the Sherman Anti-Trust Act, where it appeared that the alleged offense was the concerted publication and assessment, by several carriers, of rates approved, authorized or ordered by the Commission. This Court remarked that the provisions of the Anti-Trust Act and the Interstate Commerce Act, providing for the recovery of damages, were similar, in that no recovery could be had unless it was shown that the damages resulted from some unlawful act of the defendants; and concluded that since the act alleged to have caused injury to the claimant was in fact duly authorized by competent authority, it was not unlawful, and therefore could not give rise to legal damages. That is precisely the conclusion of the Circuit Court in the case at bar.

In

S. P. Co. v. Interstate Commerce Commission,
219 U. S. 433,

this Court, in passing upon the validity of an order of the Commission prescribing certain reduced rates for the future, said, at the conclusion of its opinion (219 U. S., at p. 452):

> "The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law, the

order of the Commission has spent its force, and therefore the question for decision is moot. * * * It is to be observed that clearly the question is without merit *in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined;* and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (Emphasis supplied.)

Particular attention is called to the italicized portion of the foregoing quotation. That expression can only be understood to mean that if the legality of the order were affirmatively determined, there could be no possible liability for reparation to which the railroads might be subjected: i. e., their compliance with a legal and valid order of the Commission could not create any right to reparation for the assessment of the charges thus established.

Petitioner asserts, however (Petition, pp. 18-19), that the decision of the Circuit Court is *probably* in conflict with this Court's decision in:

Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362.

It requires but brief analysis of the *Reagan Case* to demonstrate that the decision in the case at bar does not conflict therewith to the slightest degree. In the

first place, the *Reagan Case* involved a suit by representatives of a railroad company, brought for the purpose of enjoining, by decree of a federal court, the enforcement of certain rates prescribed by the Texas Railroad Commission for application upon Texas intrastate traffic. The basis of the suit was that the intrastate rates were so unjustly and unreasonably low as to confiscate the carrier's property, in contravention of the Fourteenth Amendment. No question was raised as to the powers, if any, of the Texas Commission to award reparation. Rates *for the future only* were involved. In the *second* place, this Court could not possibly have considered, even for purposes of illustration, whether the Interstate Commerce Commission possessed any power to award reparation, particularly as to rates which it had previously prescribed. The litigation arose in 1891 and 1892, and the decision was rendered in 1894. *At that time the Interstate Commerce Act did not confer upon the Commission power either to prescribe reasonable rates for the future or to award reparation.* Jurisdiction in those respects was not acquired until the passage of the Hepburn Amendment, in 1906 (34 Stat. 584). In the *third* place, the expressions in the opinion in the *Reagan Case,* upon which petitioner relies, if properly studied and construed in conjunction with the remainder of the opinion, support the decision of the Circuit Court in the instant case, and deny the jurisdiction which petitioner seeks to assert on the part of the Commission. *Finally,* as the Circuit Court

takes pains to point out in its opinion (R., 458-461), these expressions in the *Reagan Case*, even if given the meaning for which petitioner contends, are directly in conflict with later pronouncements of this court; e. g.;

T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448;

Mitchell Coal Co. v. Pa. Ry. Co., 230 U. S. 247, 259;

Skinner & Eddy Co. v. United States, 249 U. S. 557, 562;

Philips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 665.

The Circuit Court of Appeals has properly characterized the expressions in the *Reagan Case*, if they are to be construed as in any way relating to the reparation power of the Commission, as *dicta*, and therefore of no controlling force. Of course, pronouncements of this Court, even though by way of *dicta*, are entitled to the respect, but this Court has frequently stated that its *dicta cannot be regarded as controlling, when cited upon an issue which was not, and in the very nature of things could not have been, presented to or even considered by the Court.* See

Webster v. Fall, 266 U. S. 507;

Wolff Co. v. Industrial Court, 267 U. S. 552.

The decision of the Circuit Court in the case at bar is not in any way in conflict with any controlling decision of this Court; on the contrary, it is squarely

in accord with and directly supported by all of the relevant pronouncements of the Court.

III.

THE DECISION OF THE CIRCUIT COURT DOES NOT DENY PETITIONER ANY PROPERTY RIGHT, OR ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

It is asserted (Petition, pp. 17-18) that the Circuit Court's decision, if permitted to stand, will operate to deprive petitioner of its property without due process of law, and to deny to it property rights to which it is entitled under the Interstate Commerce Act. Petitioner argues that it is entitled, as a right of property, to have its shipments in interstate commerce transported at reasonable rates, and that the Act creates the means whereby this asserted property right may be protected, and the charging of unreasonable rates prevented. From this premise it is argued that since the Commission, in the *Third Case,* found that unreasonable rates had been charged upon petitioner's shipments, affirmance of the decision, and consequent denial of the reparation which the Commission undertook to award, will operate to deny to petitioner its right to have its shipments transported at reasonable rates.

It may be conceded that petitioner is entitled, as of right, to have its shipments transported at reasonable rates; but it does not follow that affirmance of

the decision of the Circuit Court will cause that right to be taken away. The rates charged upon petitioner's shipments were admittedly maintained and applied in conformity with a valid and continuing decision and order of the Commission which was in effect, without modification, at the time the shipments moved. By that decision and order the Commission prescribed the reasonable rates to be charged. The carriers' compliance with the Commission's order caused the rates thus established to be just and reasonable, since they were maintained in conformity with an outstanding valid determination made by the only tribunal having ultimate jurisdiction in the premises. The Circuit Court's decision declares simply that the carriers' obedience to the Commission's valid order, establishing the level of their rates, constituted a full discharge of the obligation imposed by the Act to maintain just and reasonable rates, and gave to the shipper every protection against the imposition of unreasonable charges to which it was entitled by the statute.

It is contended, however, that the Commission's finding in the *Third Case,* to the effect that the rates thus established and maintained in compliance with the prior order were in fact unreasonable, is conclusive, and that no evidence to contradict that finding was introduced by respondents. That contention is wholly without foundation. In the *first* place, the finding is not conclusive, for it was made by the Commission in the attempted exercise of a jurisdiction

which it does not possess. To assert that the finding is conclusive simply begs the question, for it assumes that the Commission possesses valid jurisdiction as to the very subject-matter with respect to which its jurisdiction is challenged. Of course, it is elementary that a finding or decision by a tribunal, upon a subject not within its jurisdiction, is utterly void and of no effect whatsoever.

Valley v. No. F. & M. Ins. Co., 254 U. S. 348;
Scott v. McNeil, 154 U. S. 34.

In the *second* place, conclusive evidence to contradict the finding upon which petitioner relies was introduced by respondents, i. e., the opinion and order in the *First Case* (R., 263-275) which constitutes a part of the agreed statement of facts; and to the showing in said agreed statement (R., 257-258) establishing that respondents published and maintained, and applied to petitioner's shipments, rates in compliance with the outstanding valid and effective order of the Commission in the *First Case,* in which the reasonable maximum rate to be applied to the transportation service was prescribed. This is not disputed or denied.

The record conclusively shows, and the Circuit Court of Appeals properly decided, that the rates charged upon petitioner's shipments were just and reasonable, in conformity with the requirements of the Act, and of the Commission's outstanding valid order, in effect at the time the shipments moved. It follows that petitioner was accorded every right of

property which it now asserts, and that the decision of the Circuit Court does not operate to deprive petitioner of its guaranteed right, under the Act, to have its shipments transported at just and reasonable rates.

IV.

WHILE THE ISSUE INVOLVED IN THE CASE AT BAR IS OF CONSIDERABLE IMPORTANCE, THERE IS NO NECESSITY FOR ANY FURTHER PRONOUNCEMENT BY THIS COURT WITH RESPECT THERETO.

At pages 13 to 16 of the petition, petitioner emphasizes its assertion that the instant case involves an important question of federal law, which has never been settled by this Court. We have already remarked that this assertion is inconsistent with petitioner's statement (Petition, p. 18) that the decision of the lower Court is *probably* in conflict with a prior decision of this Court. We agree with petitioner that the question involved is of some importance; but, as we have shown, it has already been decided, adversely to petitioner, in prior controlling decisions of this Court.

Petitioner refers, however, to decisions of the Commission in which that tribunal has maintained the opinion that it possesses jurisdiction to award reparation against rates which it has prescribed. Obviously these decisions of the Commission cannot be accorded authoritative weight in the premises. Conclusions of

the Commission upon matters of law, and particularly upon the scope of its own jurisdiction, are in no sense conclusive, or even controlling, in the courts.

United States v. Mo. Pac. R. R. Co., 278 U. S. 269.

Moreover, the assumption that the Commission has correctly decided the issue of its jurisdiction simply begs the question, for it assumes the very answer to the essential issue presented.

It may be noted that petitioner states (Petition, p. 16) that the Commission maintains that it possesses jurisdiction to award reparation to shippers, if *in fact* they have paid an unreasonable rate. That statement is misleading, in that it misrepresents the essential issue. The fundamental question is whether the Commission possesses jurisdiction to award reparation *when it appears, without dispute, that the rates published and collected were maintained and applied in conformity with the express direction, and the formal valid order, of the Commission,* such order having been in effect, without modification, at the time the shipments were transported and the charges collected. In other words, the essential issue is not whether the Commission possesses general jurisdiction to award reparation against unreasonable carrier-made rates, but whether it may validly make a retroactive order, which repudiates a prior valid decision, and thus penalize, by means of reparation awards, carriers who have in good faith complied with its prior decision, and collected charges which it has directly authorized

or prescribed. The Circuit Court has properly held that the Commission possesses no such power; that the Congress, in enacting the statute, did not confer upon the Commission jurisdiction to impose a penalty upon interstate carriers for doing the very thing which, under the law and the orders of the Commission, they were authorized or required to do.

CONCLUSION.

It is submitted that petitioner has failed entirely to show that the decision of the Circuit Court of Appeals is erroneous in any respect, or that any ground whatsoever exists requiring this Court to exercise its power of review. The petition should be summarily denied.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

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CHARLES

OCTOBER TERM, 1931.

No. 98

ARIZONA GROCERY COMPANY,
Petitioner,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Respondents.

ARIZONA GROCERY COMPANY,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS.

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Index

	Page
Chronology	1
Introductory	4
Statement of the Case	4
Statutes Relied Upon	8
Summary of Argument	8
Argument	11
I. The rates assessed, and the charges collected, upon petitioner's shipments, were conclusively established as just and reasonable, and in conformity with the requirements of the Interstate Commerce Act and of the Commission's valid findings and valid continuing order	11
(a) The Commission's findings and order in the First Case were continuously in effect without modification throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents	11
(b) The findings and order in the First Case, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power	17
(c) The Commission by its findings and order in the First Case, prescribed the maximum just and reasonable rate thereafter to be maintained, until its further order	19
(1) The primary issue presented to, and necessarily decided by, the Commission in the First Case, was whether the rate then in effect was reasonable	22
(2) The Commission has no power to prescribe a maximum rate which is other than just and reasonable	23

Page

(3) Orders of the Commission precisely similar in every essential respect to the order in the First Case have been held by this court and the inferior federal courts to be orders prescribing reasonable rates 29

(4) Both in the First Case itself, and subsequently, the Commission indicated that it regarded its action therein as the prescription of a reasonable rate 33

(5) The essential language of the finding in the First Case is substantially the same as that used in the Third Case; if the latter is construed as a finding of reasonableness, the former must be similarly construed 35

(d) Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the First Case constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable 40

II. The Interstate Commerce Act does not confer jurisdiction upon the Commission to award reparation for the charging of rates maintained and applied in conformity with the Commission's valid outstanding findings and valid continuing formal order 43

(a) The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers 43

(b) The Commission's determination in the First Case having been conclusive, respondents' compliance therewith completely fulfilled their obligation to maintain and apply reasonable rates upon petitioner's shipments. Their obedience to the Commission's findings and order could not, in legal contemplation, have been a violation of the Act, or give rise to any legal damage 46

(c) All the reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the

Page

charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary ____ 59

(1) Decisions of this court supporting respondents' contentions ____ 60

(2) Decisions of state courts and inferior federal courts which support respondents' contentions ____ 65

(3) Discussion of decisions relied upon by petitioner and *amici curiae* supporting petitioner ____ 74

(4) Discussion of grounds upon which Commission's assertion of jurisdiction in the Third Case was based ____ 81

III. If the Act were so construed as to confer upon the Commission power to award reparation under the circumstances here presented, it would to that extent be unconstitutional and void, in contravention of the Due-Process Clause of the Fifth Amendment ____ 86

(a) The Commission in awarding reparation exercises quasi-judicial power, as an agency of the judicial arm, and not of the Congress. In so doing, it is bound by its prior legislative determinations and must act with reference only to the law and the facts as they existed at the time the asserted right to damages arose 87

(b) The due-process clause of the Fifth Amendment prohibits any action on the part of the Commission, the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Commission's own prior valid legislative pronouncement ____ 91

IV. Further reply to arguments advanced by petitioner and others supporting petitioner's contentions ____ 100

(a) Affirmance of the Circuit Court's decision will neither amend the Act by implication, nor deprive the Commission of any power or authority essential to its regulatory functions ____ 100

Page

(b) The retrospective findings in the Third Case cannot be relied upon as establishing the unreasonableness of the rates charged, for the question whether those findings are valid constitutes the fundamental issue ——— 108

(c) The shipper's supposed property right to be charged no more than a just and reasonable rate is fully safeguarded by the charging of a rate conforming to a valid and continuing determination by the Commission ——— 110

(d) The opinion of the Circuit Court recognizes that a carrier's compliance with an affirmative order prescribing a reasonable maximum future rate fulfils the obligation under the Act, to maintain and charge just and reasonable rates ——— 112

(e) Petitioner's review of the course of the proceedings before the Commission is erroneous in certain particulars ——— 113

(f) A valid legislative determination made by the Commission is conclusive in a subsequent judicial proceeding, either in court or before the Commission ——— 115

(g) The decision in the *Baltimore and Ohio Case* (279 U. S. 781), does not sustain petitioner's contention 116

(h) Affirmance of the Circuit Court's decision will impose upon the Commission no greater duty of supervision over the rate-structure than is now placed upon it by law ——— 117

CONCLUSION ——— 120

Table of Cases Cited

Pages

Akron, C. & Y. Ry. Co. v. U. S. (1927), 22 Fed. (2d) 199 25

Anadarko Cotton Oil Co. v. A. T. & S. F. Ry. Co. (1910), 20 I. C. C. 43 104, 110

Anchor Coal Co. v. U. S. (1927), 25 Fed. (2d) 462 25

Ann Arbor R. R. Co. v. U. S. (1930), 281 U. S. 658; 74 L. ed. 1098 25, 28, 81, 87

Arizona Lumber Co. v. A. E. R. Co., et al. (1925), 96 I. C. C. 203 85

A. T. & S. F. Ry. Co., et al. v. U. S. (1914), 232 U. S. 199; 58 L. ed. 568, 577 22

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 42

Atlantic Coast Line R. R. Co. v. Powe (1931), 283 U. S. 401; 75 L. ed. 1142 55

Baer Brothers v. D. & R. G. R. Co. (1914), 233 U. S. 479 18, 88

Baltimore & Ohio R. R. Co. v. U. S. (1929), 279 U. S. 781 116

Blodgett v. Holden (1927), 275 U. S. 142 94

Bonfils v. Public Utilities Comm., 67 Colo. 563 72

Brimstone R. & C. Co. v. U. S. (1927), 276 U. S. 104, 109 25, 27, 83

Calder v. Bull (1798), 3 Dallas (3 U. S.) 385 95

C. R. I. & P. Ry. Co. v. U. S. (1927), 274 U. S. 29 29

Congressional Record, Vol. 58, pp. 8309-8318 27

Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443 15, 79

Eastern Livestock Cases (1928), 144 I. C. C. 741 85

E. P. & S. W. R. Co. v. A. C. C. (July 20, 1931), 51 Fed. (2d) 573 65

Fletcher v. Peck (1810), 6 Cranch (10 U. S.) 87; 3 L. ed. 162 93

Forbes Pioneer Boat Line v. Board of Commissioners (1922), 258 U. S. 338 93

G. N. R. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285, 291 18, 39, 88

Page

Harriman v. I. C. C. (1908), 211 U. S. 407 87
Hohenberg v. L. & N. R. Co. (1931), 46 Fed. (2) 952; certiorari denied, No. 70, Oct. term, 1931 81
Houston Cotton Exchange v. A. & A. R. R. Corp., 87 I. C. C. 392; 93 I. C. C. 268 30
Hurtado v. Calif. (1884), 110 U. S. 516 95

Increased Rates 1920, 58 I. C. C. 220 16
I. C. C. v. Diffenbaugh (1911), 222 U. S. 42 25
I. C. C. v. U. P. R. R. Co. (1912), 222 U. S. 541 41, 90
I. C. C. v. U. S. (1912), 224 U. S. 474 25

Keogh v. C. & N. W. Ry. Co. (1921), 260 U. S. 156 42, 60
Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1 18

Louisville & Nashville R. Co. v. Garrett (1913), 231 U. S. 298 18

Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426, 137 S. W. 608 71
McVeagh on the Transportation Act of 1920, pp. 356-358 27
Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412 89
Mellon v. World Publishing Co. (1927), 20 Fed. (2d) 613 32
Miller Mill Co. v. L. & N. R. Co., 207 Ala. 252 72
M. K. & T. Ry. Co. v. Railroad Comm. of Texas, 3 S. W. (2d) 489; 13 S. W. (2d) 680 71
Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247 38, 52, 76
Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co., et al. (1927), 25 Fed. (2d) 750 32
Morrell & Co. v. N. Y. C. R. Co. (1927), 120 I. C. C. 537 85
Murray's Lessee v. Land Co. (1856), 18 How. (59 U. S.) 272 95

National Coffee Co. v. G. C. & S. F. Ry. Co., et al. (1924), 92 I. C. C. 14 85
National Petroleum Assn. v. M. K. & T. Ry. Co., et al. (1917), 47 I. C. C. 355 85
New Pittsburgh Coal Co. v. H. V. Ry. Co. (1913), 26 I. C. C. 121 85
News Syndicate Co. v. N. Y. C. R. Co. (1927), 275 U. S. 179; 72 L. ed. 225 85

Pages

New York Central R. Co. v. N. Y. & P. Co. (1926), 271 U. S. 124 39

N. P. Ry. Co. v. Department of Public Works (1925), 136 Wash. 389; 240 Pac. 362 66

Oklahoma Corp. Comm. v. A. & S. R. Co., et al. (1925), 101 I. C. C. 116 85

Phillips v. Grand Trunk W. Ry. Co. (1913), 236 U. S. 662 ..... 51, 76

Pitwood v. N. P. Ry. Co. (1918), 51 I. C. C. 535 45

Prentis v. Atlantic Coast Line R. Co. (1908), 211 U. S. 210 ..... 17, 89

Rate Structure Investigation—Grain, 164 I. C. C. 619 106

Rate Structure Investigation—Iron and Steel Articles (1929), 155 I. C. C. 517 85

Rate Structure Investigation—Livestock, 176 I. C. C. 1 106

Reagan v. Farmer's Loan and Trust Co. (1894), 154 U. S. 362 75

Reduced Rates 1922, 68 I. C. C. 676 16

St. L.-S. F. Ry. Co. v. Montrose Oil Ref. Co. (1927), 25 Fed. (2d) 755 32

Scott, M. & M. v. W. P. Ry. Co., 2 Op's. R. R. Comm. of Cal. 626 101

Skinner & Eddy Corp. v. U. S. (1919), 249 U. S. 557 99

S. P. Co. v. I. C. C. (1911), 219 U. S. 433 ..... 24, 63, 81

T. & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426 ..... 76, 77

T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059 72

Traffic Bureau, Phx. Chamber of Com. v. The A. T. & S. F. Ry. Co., 95 I. C. C. 244 5

Traffic Bureau, Phx. Chamber of Com. v. The A. T. & S. F. Ry. Co., et al., 140 I. C. C. 171 6

Traffic Bureau, Phx. Chamber of Com. v. Director General, et al., 62 I. C. C. 412 5

Twining v. New Jersey (1908), 211 U. S. 78 95

Pages

U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269 81
United States v. New River Co. (1924), 265 U. S. 533 ..... 56, 90
United States v. N. Y. C. R. Co. (1924), 263 U. S. 603 ..... 25, 28, 81
Untermyer v. Anderson (1928), 276 U. S. 440 94

Virginian R. Co. v. U. S. (1926), 272 U. S. 658 42

Webster v. Fall (1925), 266 U. S. 507 77
Western Paper Maker's Chemical Co. v. U. S. (1926), 271 U. S. 268 42
Winsor Coal Co. v. C. & A. R. Co. (1892), 52 Fed. 719 65
Wolff Co. v. Industrial Court (1925), 267 U. S. 552 77
World Publishing Co. v. Director General (1919), 53 I. C. C. 491 32

Young Co. v. Payne, 127 Miss. 48 72

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Respondents.

ARIZONA GROCERY COMPANY,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS.

Chronology

June 22, 1921: Commission rendered opinion, and issued formal continuing order in *"First Case"* (62 I. C. C. 412), prescribing reasonable maximum future rate of 96½ cents,[1] on sugar, carloads, from

[1] All rates referred to are stated in amounts per hundred

California points to Phoenix, Ariz. (R. 256).

Sept. 17, 1921: Carriers complied with order in *First Case,* by establishing rate of 96 cents (R. 257).

July 1, 1922: 96-cent rate voluntarily reduced by respondent carriers to 86½ cents. Order in *First Case* still in effect (R. 257-258).

Feb. 21, 1923: Date of movement of *first* shipment upon which reparation is sought by petitioner. Order in *First Case* still in effect (R. 255).

Jan. 10, 1924: 86½-cent rate voluntarily reduced by respondent carriers to 84 cents. Order in *First Case* still in effect (R. 258).

Feb. 5, 1925: Date of movement of *last* shipment upon which reparation is sought by petitioner. Order in *First Case* still in effect (R. 255).

Feb. 25, 1925: Effective date of Commission's opinion and order in *"Second Case"* (95 I. C. C. 244), rendered Jan. 6, 1925, prescribing, for future, reasonable maximum rate of 71 cents, and modifying order in *First Case* to that extent. Reparation on prior shipments found due, but not awarded (R. 258-260).

Feb. 8, 1927: *Second Case* reopened for further consideration, but order prescribing 71

cent rate not vacated (R. 260). 71-cent rate continued in effect.

Mar. 12, 1928: Commission rendered opinion and order in *Third Case,* (140 I. C. C. 171) prescribing future rates to Phoenix and other Arizona points; also finding that past rates to Phoenix, from and after July 1, 1922, had been unreasonable to extent they exceeded 73 cents from Northern California, and 71 cents from Southern California; and that petitioner and other shippers entitled to reparation down to that basis of rates (R. 260-261).

Mar. 11, 1929: Commission issued order for payment of reparation to petitioner (R. 261-262), with which respondents declined to comply.

Oct. 16, 1929: Complaints in instant cases filed with U. S. District Court for Arizona (R. 47, 91).

July 15, 1930: Judgments for petitioner rendered by U. S. District Court for Arizona (R. 225-230).

Mar. 23, 1931: Judgments for petitioner reversed by U. S. Circuit Court of Appeals, Ninth Circuit (R. 463-464): Opinion by Wilbur, J. (R. 438-462).

Oct. 12, 1931: Certiorari to review judgment of U. S. C. C. A., 9th Circuit, granted (R. 467).

Introductory.

The essential issue presented in this proceeding is whether the Interstate Commerce Commission has jurisdiction under the Interstate Commerce Act to make a valid order for the payment of reparation (i. e., damages) by carriers subject to the Act for the collection of alleged unreasonable freight rates, when it appears that the rates assessed and the charges collected, (with respect to which such reparation is attempted to be awarded), were equal to or less than those which the Commission had itself directly prescribed or approved as maximum reasonable rates, by valid formal findings and a valid formal continuing order, in effect without modification at the time the rates were applied and the charges collected. The Circuit Court of Appeals for the Ninth Circuit has declared, in the decision here under review (49 Fed. (2d) 563; R. 438-462), that the Commission has no such power under the Act, and that a purported order for the payment of reparation, made under the circumstances described, is invalid and unenforcible.

Statement of the Case.

While the statement of the case appearing in petitioner's brief (Brief, pp. 2-6) is largely correct, it does not present all of the facts in their proper relationship. Moreover, briefs have been filed by the Arizona Corporation Commission, and others as *amici*

curiae, in which the facts are to some extent inaccurately stated. The essential facts are set forth rather completely, in the opinion of the Circuit Court (R. 438-453). Briefly, they are as follows:

On June 22, 1921, the Interstate Commerce Commission rendered its opinion and order (R. 263-275) in:

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412.

In that decision (hereinafter referred to as the *First Case*) the Commission found that, for the future, reasonable rates on sugar, in carloads, from all points in California to Phoenix, Arizona, should not exceed 96½ cents. The defendant carriers were ordered to establish, on or before September 17, 1921, and thereafter to maintain until the Commission's further order, rates not exceeding the figure named. The carriers complied with the order by establishing (September 17, 1921) a rate of 96 cents. That rate was afterwards twice voluntarily reduced: first to 86½ cents (July 1, 1922), and later to 84 cents (January 10, 1924).

On January 6, 1925, in response to a complaint filed November 3, 1922, the Commission rendered its opinion and order (R. 276-290) in the so-called *Second Case*:

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 95 I. C. C. 244.

In that decision the Commission found that the 84-cent rate then in effect was, and in future would be, unreasonable, and ordered that it be reduced to not more than 71 cents, from and after February 25, 1925. The carriers duly complied with the order, and established the 71-cent rate on the date specified.

The Commission also undertook to *find*, in the *Second Case*, that reparation was due upon shipments moving prior to the effective date of its order, and during the period when the order in the *First Case* was still in effect; but no *order* for the payment of reparation was actually made. The *Second Case* was subsequently reopened (February 8, 1927: R. 260), and consolidated with a number of other reparation cases in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, in the so-called *Third Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., et al.*, 140 I. C. C. 171.

In that decision (R. 290-309) the Commission modified its conclusions in the *Second Case* with respect to the future, by prescribing a rate of 73 cents from Northern California points to Phoenix, instead of the 71-cent rate previously ordered. *It did not attempt to make that finding retroactive, so as to increase charges collected under the 71-cent rate.* It also undertook to find that rates in effect during the period prior to the decision in the *Second Case*, while the continuing order

in the *First Case* was still in effect and unchanged, had been unreasonable; that petitioner and other shippers, who had made shipments under such rates and paid charges based thereon, had been damaged thereby and were entitled to reparation, to the extent that the charges paid exceeded those accruing under rates thus retroactively determined to have been unreasonable. In due course, the Commission issued its formal order (March 11, 1929), directing respondents to pay such reparation (R., 46-47), but allowed no off-setting credit, in favor of the respondents, on account of the difference between the 71-cent rate first ordered in effect, and the 73-cent rate later found reasonable from Northern California.

All of petitioner's shipments as to which reparation was awarded moved during the period between February 21, 1923, and February 10, 1925. The charges thereon were based upon the rates of 86½ cents and 84 cents, successively in effect during that period, maintained by respondents pursuant to authority of, and in compliance with, the order in the *First Case*, then outstanding and unmodified.

Respondents declined to comply with the reparation order of March 11, 1929; and petitioner thereafter brought suit in the United States District Court for Arizona. Its suits were consolidated, and submitted upon an agreed statement of facts (R., 254-319), to the trial court sitting without a jury. That court ruled that the reparation order sued upon was valid,

and after making special findings of fact and conclusions of law (R., 355-375), rendered judgments for petitioner (R., 228-230). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments were reversed (R., 463-464), that court having concluded, as before stated, that the Commission's reparation order was void and of no effect.

Statutes Relied Upon.

The relevant portions of the statutes relied upon are set forth in the Appendix to this brief. They consist of the following portions of the Interstate Commerce Act:

Section 1, paragraphs 4, 5 (49 U. S. C. 1, 4, 5; 34 Stat. 584, as reenacted in 1920, 41 Stat. 474);
Section 8 (49 U. S. C. 8; 24 Stat. 382);
Section 9 (49 U. S. C. 9; 24 Stat. 382);
Section 12, paragraph 1 (49 U. S. C. 12, 1; 26 Stat. 743);
Section 16, paragraph 1 (49 U. S. C. 16, 1; 41 Stat. 491).

Summary of Argument.

I. The rates assessed, and the charges collected, upon petitioner's shipments, were conclusively established as just and reasonable, and in conformity with the requirements of the Interstate Commerce Act and of the Commission's valid findings and valid continuing order.

(a) The Commission's findings and order in the *First Case* were continuously in effect, without modification, throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

(b) The findings and order in the *First Case*, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power.

(c) The Commission, by its findings and order in the *First Case*, prescribed the maximum just and reasonable rate thereafter to be maintained, until its further order.

(d) Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the *First Case* constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable.

II. The Interstate Commerce Act does not confer jurisdiction upon the Commission to award reparation for the charging of rates maintained and applied in conformity with the Commission's valid outstanding findings and valid continuing formal order.

(a) The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers.

(b) The Commission's determination in the *First Case* having been conclusive, respondents'

compliance therewith completely fulfilled their obligation to maintain and apply reasonable rates upon petitioner's shipments. Their obedience to the Commission's findings and order could not, in legal contemplation, have been in violation of the Act, or give rise to any legal damage.

(c) All reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary.

III. If the Act were so construed as to confer upon the Commission jurisdiction to award reparation under the circumstances here presented, it would to that extent be unconstitutional and void, in contravention of the due-process clause of the Fifth Amendment.

(a) The Commission, in awarding reparation, exercises quasi-judicial power as an agency of the judicial arm and not of the Congress; and in so doing, it can act only with reference to the law and the facts as they existed at the time the asserted right to damage arose.

(b) The due process clause of the Fifth Amendment prohibits any action on the part of the Commission the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Com-

mission's own prior valid legislative pronouncement.

IV. Further reply to arguments advanced by petitioner and others supporting petitioner's contentions.

Argument.

I.

THE RATES ASSESSED, AND THE CHARGES COLLECTED, UPON PETITIONER'S SHIPMENTS, WERE CONCLUSIVELY ESTABLISHED AS JUST AND REASONABLE, AND IN CONFORMITY WITH THE REQUIREMENTS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMISSION'S VALID FINDINGS AND VALID CONTINUING ORDER.

(a) The Commission's findings and order in the First Case were continuously in effect without modification throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

It is important, at the very outset of this argument, to make it quite clear that the Commission's findings and order in the *First Case* were continuously in effect, without modification, throughout the entire period of movement of the shipments upon which reparation is sought by petitioner; and that the rates and charges assessed and applied upon those shipments by the respondents were established and maintained in full and literal compliance with the Commission's order.

The Commission rendered its opinion and order in the *First Case* on June 22, 1921 (R. 263-275). In

the order the Commission, after *reciting that a full investigation of the matters and things involved had been had* (R. 274), by appropriate language required the defendants to cease and desist from charging the rates then in effect on sugar from California points to Phoenix, and to establish, on or before September 17, 1921, and thereafter to maintain and apply, to the transportation of sugar, in carloads, from and to the points named, rates which should not exceed 96½ cents. It was further specifically provided that the order should continue in force *"until the further order of the Commission"*. It is not disputed that the making of a continuing order of this kind is within the powers conferred upon the Commission, particularly by Section 15 (2) of the Interstate Commerce Act (49 U. S. C. 15-2).

The order, by its terms, only required the carriers to establish rates "which should not exceed" the definite figure named by the Commission. It seems quite clear (and indeed, our opponents apparently agree: e. g., Petitioner's Brief, p. 14) that any rate which the carriers might establish, not exceeding the maximum thus set, was within the terms of the order, and constituted full and complete compliance therewith.

The respondents did not take full advantage of the maximum rate authorized by the Commission. Instead they established, on September 17, 1921 (the effective date of the order) a rate of 96 cents; and thereafter voluntarily reduced that rate twice: first, to

86½ cents (July 1, 1922) and subsequently to 84 cents (effective January 10, 1924). During this entire time the Commission's order of June 22, 1921, remained in full force and effect, without modification. The petitioner's shipments moved during the period between February 21st, 1923, and February 10, 1925, and were assessed charges based on the rates of 86½ cents and 84 cents successively in effect during that time.

The correctness of the above proposition is in effect conceded by our opponents, either expressly, or by failure to assert the contrary. In petitioner's brief it is said (at p. 14):

> "Such voluntary reductions were not at variance with the Commission's order."

In the brief for the Arizona Corporation Commission, which has been adopted by the National Association of Railroad, etc., Commissioners, it is said (at p. 6):

> "The issue * * * is whether rates exacted by a carrier which conform to a tariff not violative of an outstanding order of the Interstate Commerce Commission * * * are conclusively presumed to be lawful."

In the brief for the Interstate Commerce Commission, the following appears (at pp. 2, 3):

> "The question * * * is whether the Commission has power * * * to award reparation on shipments made on rates exacted by carriers subject to the Interstate Commerce Act, which were established pursuant to an order of the Commission fixing reasonable rates. * * *

> "In compliance with that order the carriers established a rate of 96 cents * * *."

In the brief tendered by Felix T. Smith and others as *amici curiae*, it is said (at p. 4):

> "* * * It appears that such rates are equal to or lower than rates prescribed by the Commission's order in a prior proceeding."

In spite of these admissions the Interstate Commerce Commission (at pp. 22-24 of its brief) offers the somewhat hesitant and apologetic suggestion that "it may well be argued that the rates involved were not Commission-made". The purpose of this suggestion is obscure, for the Commission does not undertake to define what it understands by the term "Commission-made". It may be noted that none of our other opponents advances any similar suggestion. Possibly the Commission intends to convey the impression that the rates as published and applied, having (as our opponents all admit) been voluntarily reduced by the carriers below the reasonable maximum prescribed by the outstanding and continuing order in the *First Case*, were no longer responsive to or in compliance with the terms of the order; that they were "carrier-made," and therefore no longer carried the Commission's contemporaneous sanction and approval. If such be the Commission's purpose, the suggestion conflicts directly with its own admissions, above-quoted, and with the position adopted by all our other opponents as well, to the effect that the carriers *complied*

with the order in the *First Case* as long as it continued effective.

In the very nature of things, the voluntary publication of rates less than the reasonable maximum fixed by the Commission must have resulted in rates just as properly to be termed "Commission-made", as the exact rate named in the Commission's findings and order. It is conceded that the order fixed only a reasonable maximum rate, and not the exact or only rate thereafter to be charged. Admittedly, the carriers did exactly as they were directed. Since the greater includes the less, it follows that the resulting rates were just as completely within the terms of the Commission's order, and thus just as much "Commission-made", as if the 96½-cent rate and no other had been published.

Reference is made by the Commission to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443,

to support its suggestion. While we do not agree with the conclusions of the Circuit Court in that, nevertheless the most superficial study of that decision will disclose that it is not in point upon the issue here discussed, and does not sustain the Commission's position at all. In the *Eagle Case*, as the opinion shows, a preliminary question was whether a rate approved (but not prescribed) by the Commis-

sion in 1915 retained its Commission-made status in 1925, after having been modified several times during the intervening period. The rate originally approved by the Commission in 1915 was $1.20 per ton. In 1917 that rate was advanced to $1.30, pursuant to general authority of the Commission. In 1918 it became $1.80, in response to a general order of the Director General of Railroads, then in charge of all carrier properties. In 1920 it was advanced to $2.25, pursuant to general authority given by the Commission in:

Increased Rates 1920, 58 I. C. C. 220.

In 1922 it was voluntarily reduced to $2.03, in line with the recommendations made by the Commission in:

Reduced Rates 1922, 68 I. C. C. 676.

The court, after taking into consideration the intervening advances, as well as the fact that in 1915 an affirmative order of the Commission issued pursuant to Section 15 could have an effective life of no more than two years, held that the $2.03 rate, the evolution of the $1.20 rate originally approved, was not a Commission-made rate, as applied to shipments moving in 1925.

The distinction between those facts and the facts involved in the instant case is apparent. In the case at bar, the Commission's order was issued in 1921, under the amended statute which provides that such an order is to have continuing effect until thereafter changed. It prescribed a rate of 96½ cents. That rate was never advanced. The 96-cent rate published

in compliance with the order was twice successively reduced, by *voluntary* action of the carriers; but at no time was there any rate published in excess of the maximum reasonable rate fixed by the Commission, nor was there any attempt to take advantage of any general order, authorizing increases in all rates; for no such order was made by the Commission during the period involved.

(b) The findings and order in the First Case, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power.

It has often been said that when the Commission undertakes, by means of formal findings and orders, to determine and establish rates to be observed for the future, it is acting in a quasi-legislative capacity; that is to say, it exercises a function which resides in the legislature, and has been delegated by the latter to the Commission. In:

Prentis v. Atlantic Coast Line R. Co. (1908), 211 U. S. 210,

this court said (at p. 226):

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule,* to be applied thereafter to all or some part of those subject to its power. *The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind,* * * *." (Emphasis ours.)

In:

Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1,

this court said (at p. 8):

> "Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

In:

Louisville & Nashville R. Co. v. Garrett (1913), 231 U. S. 298,

this court said (at p. 305):

> "It has frequently been pointed out that prescribing rates for the future is an act legislative and not judicial in kind (citing cases). It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

To the same effect see also:

Baer Brothers v. D. & R. G. R. Co. (1914), 233 U. S. 479, 486;

G. N. R. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285, 291.

In the *First Case,* the Commission was unquestionably exercising this quasi-legislative power, for it undertook to establish the level of the rates to be observed by the respondent carriers from and after the effective date of the order. Its findings and order constituted a declaration by the Commission, made in the same manner as if Congress itself had spoken, that the just and reasonable rate thereafter to be observed as a maximum, for the transportation service considered, should not exceed 96½ cents, which rate, under the terms of the Commission's quasi-legislative enactment, thereby became the legal measure of the just, reasonable and lawful rate to be thereafter applied as long as the order continued in effect.

(c) The Commission by its findings and order in the First Case, prescribed the maximum just and reasonable rate thereafter to be maintained, until its further order.

It is contended and indeed vigorously asserted, by petitioner (Brief, pp. 12-14, 21-22), that the Commission, when it ordered the carriers not to exceed a rate of 96½ cents, did not thereby establish that 96½-cent rate as a *reasonable* rate, or declare what the reasonable rate in the premises should be (i. e., a rate conforming to the requirements of Section 1 (4, 5) of the Act); that it was undertaking only to prescribe a *maximum* rate (and not a reasonable rate). From this premise it is argued that since Section 1 of the Act requires that all rates and charges of common carriers shall be just and reasonable, a continuing duty is laid upon carriers to see

that their charges meet that requirement, which duty is not discharged by the publication and assessment of a rate equal to or less than that which the Commission itself has prescribed as a maximum, unless the rate thus published is also reasonable "in fact" as determined by subsequent judgment of the Commission; that if a published rate is not reasonable "in fact", it is unlawful and in violation of the Act, though equal to or even substantially less than the rate prescribed, approved and authorized, by a formal decision of the Commission, and that the carrier is therefore liable in damages for its assessment. Indeed, this contention is the very essence of the petitioner's case; for apparently it concedes that a carrier's compliance with a continuing formal order of the Commission prescribing a *reasonable* rate, as distinguished from a maximum rate (if any such distinction can exist) constitutes a full discharge of its duty to maintain and apply a just and reasonable rate and/or charge for the service considered, and renders it immune to any attempt to reduce that rate retroactively by an award of reparation, as for an asserted violation of the statute.

It may be observed that the Interstate Commerce Commission, appearing here as *amicus curiae*, does not agree with petitioner in this particular. The Commission apparently agrees, as perforce it must in view of expressions appearing in its opinions in the *First* and *Third Cases*, that its action in the *First Case* constituted, both in fact and in intent, the prescription of

a *reasonable* maximum rate for the future (Brief for I. C. C., p. 2).

It is our position that the Commission's findings and order in the *First Case* must necessarily be regarded as having prescribed, not merely a maximum rate, but the *reasonable* maximum rate which the carriers concerned could thereafter charge, as long as the findings and order continued effective, for the following reasons:

(1) The primary issue presented to, and necessarily decided by, the Commission, in the *First Case,* was whether the rate then in effect was reasonable;

(2) The Commission has no power to prescribe a maximum rate which is other than just and reasonable;

(3) Orders of the Commission, precisely similar in every essential respect to the order in the *First Case,* have been held by this court and the inferior federal courts to be orders prescribing reasonable rates;

(4) Both in the *First Case* itself, and subsequently, the Commission has indicated that it regarded its action therein as the prescription of a reasonable rate; and

(5) The essential language of the finding in the *First Case* is substantially the same as that used in the *Third Case;* if the latter is construed as a finding of reasonableness, the former must be similarly construed.

(1) *The primary issue presented to, and necessarily decided by, the Commission in the First Case, was whether the rate then in effect was reasonable.*

The statement of the issues appearing in the body of the Commission's report in the *First Case* specifies that the important issue presented to it was whether the existing rate was reasonable (R., 264). Under Section 13(1) of the Act (49 U. S. C. A., 13(1)) it was the Commission's duty, upon a complaint presenting such an issue, to enter into an investigation and to make a decision thereon. It has been specifically held that the Commission, when complaint is made to it, must make a determination in response to the issues thereby raised.

A. T. & S. F. Ry. Co., et al. v. U. S. (1914), 232 U. S. 199, 221; 58 L. ed. 568, 577,

"What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice, or rendering other transportation services, are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (Section 6), and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a

through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. *All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices.*" (Emphasis ours.)

It cannot be assumed that the Commission failed in the duty thus directly laid upon it. It is not alleged, has never been asserted, and the trial court has not found, that the Commission failed to perform its statutory duty in the premises. No question has ever been raised as to the *validity* of the decision in the *First Case*. It has stood unchallenged in that respect, and its correctness from the legal standpoint must be conceded. It follows then that the necessary legal effect of the Commission's decision must have been the determination, not merely of a maximum rate, but of a *reasonable* rate, for the future; and that the Commission's order, issued concurrently with and as part of the final disposition of the proceeding, was an order fixing a *reasonable* rate, as defined by Section 1 (4, 5) of the Act.

(2) *The Commission has no power to prescribe a maximum rate which is other than just and reasonable.*

Petitioner's argument carries the essential implication that the Commission is empowered by law to prescribe and authorize a maximum rate, which is nevertheless unlawful, i. e., unreasonable; that in ren-

dering its decision in the *First Case* it undertook to perform that unlawful act. That contention is squarely opposed to ordinary reason and logic; moreover, it is specifically disposed of, by a number of decisions of this court, which definitely establish that the Commission has no power to prescribe other than just, reasonable, and lawful rates; that when it acts within the scope of its powers, and renders valid findings and a valid order, the rates resulting therefrom are conclusively established as just, lawful and reasonable. A leading case which declares that the Commission has no power to prescribe other than a just and reasonable rate is:

S. P. Co. v. I. C. C. (1911), 219 U. S. 433,

in which this court said (at pp. 443, 444):

> "The insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently

that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered.

* * * * * * *

"Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

Other cases to the same effect include:

I. C. C. v. U. S. (1912), 224 U. S. 474; 56 L. ed. 849;

I. C. C. v. Diffenbaugh (1911), 222 U. S. 42, 47; 56 L. ed. 83;

United States v. N. Y. C. R. Co. (1924), 263 U. S. 603, 610; 68 L. ed. 470;

Ann Arbor R. R. Co. v. U. S. (1930), 281 U. S. 658, 668; 74 L. ed. 1098;

Brimstone R. & C. Co. v. U. S. (1927), 276 U. S. 104, 109;

A. C. & Y. Ry. Co. v. U. S. (1927), 22 Fed. (2d) 199, 203;

Anchor Coal Co. v. U. S. (1927), 25 Fed. (2d) 462.

Petitioner nevertheless insists (Brief, pp. 12-14) that Section 15(1) of the Act is to be interpreted as authorizing the Commission to prescribe a maximum rate which may lawfully exceed the absolute level of a just and reasonable rate. Under Section 15, as enacted in 1906 (34 Stat. 589), and subsequently amended by slight additions in 1910 (36 Stat. 551), the Commission was authorized and empowered and charged with the duty, whenever upon complaint it should be of opinion that a rate was or would be unreasonable, "to determine and prescribe what will be the just and reasonable rate or rates, or charges, to be thereafter observed in such case as the maximum to be charged", and to order the carriers to cease and desist from the violation, and thereafter to refrain from publishing or receiving any rate in excess of the maximum prescribed by the Commission. Under that statute, the Commission could obviously prescribe only a reasonable maximum rate; it could not prescribe a maximum rate which was other than reasonable. Under the statute as it now reads, as amended by the Transportation Act of 1920 (41 Stat. 484), the Commission is authorized to prescribe the just and reasonable rate, or the maximum, or minimum, or maximum and minimum, to be charged. In other words, the Commission, in addition to having the power which it previously possessed, to prescribe a maximum reasonable rate, may now prescribe the minimum rate, or the exact rate, to be charged. But the amendment nowhere contains any language authorizing the Commission to prescribe a maximum rate which will exceed

an inherently just and reasonable charge for the service in question. The whole text of the paragraph, and its entirely legislative history, show that the Commission's power to prescribe the exact rate, or the maximum, or minimum, which was conferred by the 1920 amendment, was given in order to make certain that all charges should be just and reasonable to carrier and shipper alike, and that undue prejudice and discrimination might be prevented, and ruinous rate-wars avoided. Compare:

McVeagh on the Transportation Act of 1920, pp. 356-358;

Congressional Record, Vol. 58, pp. 8309-8318.

Any rate which the Commission fixes must comply with the provisions of Section 1(5) of the Act, which requires that *all* rates, etc., be just and reasonable, and makes no distinction between a rate or charge initiated by a carrier and one prescribed by the Commission. Decisions of this court, rendered since 1920, and reviewing the Act as it now exists, uphold the principle that although the Commission's power has been enlarged to the extent indicated, it has not been authorized to prescribe rates which do not meet the essential requirement of the Act that they be just and reasonable. In

Brimstone R. & C. Co. v. U. S., supra,

this court said (276 U. S., at p. 109):

"Section 15(1) empowers the Commission whenever, after full hearing it shall find any rate charged by a carrier is or will be unjust or unreasonable or unjustly discriminatory or unduly

preferential or prejudicial or otherwise in violation of this Act, *to determine and prescribe the just and reasonable rate thereafter to be observed* and to make an order requiring the carrier to cease and desist from such violation." (Italics ours.)

In:

U. S. v. N. Y. C. R. Co., supra, and
Ann Arbor R. Co. v. U. S., supra,

this court again indicated that Section 15(1) is to be read in conjunction with Section 1(5), and the Act is not to be construed as authorizing the Commission to prescribe rates which are not reasonable, and in conformity with the applicable sections of the statute.

Moreover, as we shall show in the next succeeding subdivision of this discussion, orders of the Commission, issued since 1920, pursuant to the authority conferred by Section 15(1) as it now reads, have been construed by this court and by inferior federal courts as orders prescribing maximum reasonable rates, no distinction being made between a maximum rate, on the one hand, and a reasonable rate, on the other. In their essential phraseology those orders were precisely identical with the order in the *First Case*.

It is quite illogical to argue that the power conferred upon the Commission by Section 15(1), the express and essential purpose of which is to enable the Commission to correct proven violations of Section 1, actually permits that end to be accomplished by an

unlawful act; namely, the authorization or prescription of a so-called maximum rate which in actual fact is unreasonably high. The order in the *First Case* was issued following a "full investigation," and based upon ample evidence (R. 274-275). It was indisputably valid. It resulted in the determination of a rate which, in legal contemplation, could not have been other than just, reasonable and lawful, and in full conformity with the requirements of Section 1(5) of the Act.

(3) *Orders of the Commission precisely similar in every essential respect to the order in the First Case have been held by this court and the inferior federal courts to be orders prescribing reasonable rates.*

Our contention that the order in the *First Case* should be construed as an order prescribing a reasonable rate is supported by a number of court decisions in which orders of the Commission, issued under authority conferred by the Act as it now reads, have been construed as orders prescribing reasonable rates. In all essential respects these orders of the Commission were of precisely the same character as the order in the *First Case*. In:

C. R. I. & P. Ry. Co. v. U. S. (1927), 274 U. S. 29,

this court affirmed a decision of the United States District Court for the Northern District of Texas, re-

ported 6 Fed. (2d) 888, in which was involved the validity of an order issued by the Commission in conjunction with its decisions in:

Houston Cotton Exchange v. A. & A. R. R. Corp., 87 I. C. C. 392; 93 I. C. C. 268.

The Commission's findings in these cases were substantially similar, in their essential phraseology, to the finding in the *First Case* (R. 273). In its opinion this court summarized the Commission's final order in the following language:

> "The modified final order of the Commission required appellants to establish and maintain for the transportation of cotton from Oklahoma points * * * to destinations in New England territory, joint rail and water rates not exceeding 'rates 4 cents per 100 pounds lower than the present all-rail rates from and to the same points.' * * * The Commission found that the establishment of joint rail and water rates on cotton between the points in question was desirable in the public interest, and that the existing rates for such transportation were unreasonable to the extent that they exceeded or may exceed rates constructed by the deduction of 4 cents from the present all-rail rates."

The court treated this order as one prescribing *reasonable* rates for the future, saying:

> *"The complaint before the commission plainly sought the establishment of reasonable rates,* and the order of the commission directed the carriers

to discontinue the then existing rates made up of combinations of local rates and substitute the maximum joint rates which were prescribed in the words already stated. *The commission found that rates were and would be unreasonable to the extent they exceeded or might exceed those prescribed.* In form, *the action of the commission was responsive to the case made by the complainant,* and to hold that, in fact, its order was not one fixing reasonable rates but an order equalizing rates would be to put undue stress upon certain recitals contained in the report, to which our attention is called but which need not be detailed. If these recitals stood alone, they might give plausibility to the contention; but from a consideration of the entire record we think it quite unfair to conclude that the commission undertook to exercise an authority entirely different and distinct from that which the complaint specifically invoked.

* * * * * * * *

"Here, it is true, the order fixes the rail-and-water rate by relating it in terms to the all-rail rate; but, *since we accept the view that the former was, in fact, established as a just and reasonable rate,* there can be no objection to the form of words adopted as a method of short and convenient description of that rate." (Emphasis ours.)

We call particular attention to the concluding portion of this quotation, in which this court indicated its acceptance of the view that the rates established by the

Commission were prescribed *as just and reasonable rates.* In:

Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co., et al. (1927), 25 Fed. (2d) 750,

the United States District Court for the Northern District of Texas reviewed findings and orders made by the Commission in a proceeding of the same title:

78 I. C. C. 572; 95 I. C. C. 96.

After referring to the specific findings and order made by the Commission, the court reached conclusions similar to those reached by this court in its decision last above cited, observing that the Commission's order, naming a figure which the carriers were directed not to exceed for the future, was an order fixing a reasonable rate. The judgment was affirmed and the District Court's opinion adopted by the Circuit Court of Appeals for the Fifth Circuit:

St. Louis-San Francisco Ry. Co. v. Montrose Oil Refining Co. (1927), 25 Fed. (2d) 755.

In:

Mellon v. World Publishing Co. (1927), 20 Fed. (2d) 613,

the Circuit Court of Appeals for the Eighth Circuit expressed substantially similar views, upon consideration of the Commission's decision and order in:

World Publishing Co. v. Director General (1919), 53 I. C. C. 491.

No essential distinction can be observed between the Commission's order in the *First Case*, by which the maximum reasonable future rate from California points to Phoenix was prescribed, and the orders fixing future rates, under review in the cited cases. These decisions are squarely in point, and establish that an order of the Commission directing carriers subject to its jurisdiction to establish, and maintain for the future, a rate not exceeding a named and ascertainable figure is, from the legal standpoint, an order fixing the figure named as the maximum reasonable rate thereafter to be applied.

(4) *Both in the First Case itself, and subsequently, the Commission indicated that it regarded its action therein as the prescription of a reasonable rate.*

The Commission itself, in its opinions both in the *First Case*, and the more recent cases in which it has reviewed that decision, has characterized the rate which it there prescribed as a *reasonable* rate. The very text of the opinion in the *First Case* indicates that the Commission regarded the rate as having been fixed at a reasonable figure. For example, the headnote to the Commission's report reads in part as follows (R. 263):

> "Rates on sugar in carloads from California points to Phoenix, Arizona, found unreasonable. *Reasonable rate prescribed for the future.*" (Emphasis ours.)

That reasonable rate was, of course, the 96½-cent rate referred to in the opinion, and specifically named as the maximum reasonable future rate in the order. In the opinion itself the Commission said (R. 273):

> "We find that the rates attacked were, are, and for the future will be unreasonable *to the extent that they exceeded; exceed, or may exceed 96.5 cents.* There is no evidence of record that complainants made shipments of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher *than those herein found reasonable.*" (Italics ours.)

The decision in the *Second Case* (95 I. C. C. 244; R. 276-290) was a decision of the entire Commission, four Commissioners dissenting. The separate dissenting opinion of Commissioner Hall (95 I. C. C., pp. 248-250; R. 285-288) concurred in by Commissioners Atchison, Esch and Lewis, refers to the 96-cent rate, voluntarily established by the carriers following the decision in the *First Case,* as a reasonable rate, which was subjected to the two subsequent voluntary reductions previously noted (R. 257, 258). Commissioner Hall says that "all of these (voluntary rates) were lower than what we had found *reasonable* and prescribed" in the *First Case;* and further:

> "And yet they (the majority) find unreasonable rates lower than the rates prescribed in the (first) case and award reparation to a level 17.5 cents lower than *that found reasonable.*"

The decision in the *First Case* was further reviewed in the *Third Case,* and the Commission there said (140 I. C. C. 171, 179, 180; R. 306-307):

> "Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cents less than *the rate prescribed as reasonable by us from and to the same points in Phoenix Chamber of Commerce v. Director General,* supra, referred to as the First Phoenix Case. * * * Upon this record we reach the conclusion that *the rate prescribed in the First Phoenix Case,* during the period embraced in these complaints, is unreasonable and that a lower rate would have been reasonable during that period." (Emphasis supplied.)

These references demonstrate that both in 1921, when the *First Case* was decided, and likwise in 1925 and 1928, when that decision was reviewed, the Commission considered that in ordering the carriers to establish for the future rates not exceeding 96½ cents, it had, both in fact and in legal contemplation, prescribed that figure as a just and reasonable maximum rate.

(5) *The essential language of the finding in the First Case is substantially the same as that used in the Third Case; if the latter is construed as a finding of reasonableness, the former must be similarly construed.*

It should be particularly noted that the Commission, in making the findings in the *Third Case* upon

which the reparation order in suit is based, employed language exactly corresponding to that which was used in its prior finding in the *First Case.* Thus, in the *First Case,* the Commission's finding respecting the proper level of the rate to be observed, both for the past *and for the future,* reads as follows (R. 273):

> "We find that the rates attacked were, are *and for the future* will be unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents." (Italics ours.)

In the *Third Case,* its findings respecting the past and future levels of the rates under attack were as follows (R. 307, 308):

> "We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed or may exceed respectively the following in cents per hundred pounds:" (here follows a specific statement of rates to various Arizona points).

In similar manner, the *order* made by the Commission in the *Third Case,* prescribing the reasonable rates to be observed for the future (R. 314, 315) employs precisely the same phraseology, dates and amounts only being changed, as that employed in the corresponding portions of the order in the *First Case* (R. 275).

The petitioner's asserted right to reparation depends entirely upon the finding, in the *Third Case,*

to the effect that the assailed rates to Phoenix had been unreasonable in the past, to the extent that they exceeded the amounts named in the opinion. In order to maintain its suit at all, petitioner must, and does, insist that that finding is a finding of "reasonableness", within the meaning of Section 1(5) of the Act. Unless the finding is thus interpreted, the order for the payment of reparation, upon which petitioner must rely, has no basis whatsoever and is void. But if that interpretation is accorded the finding in the *Third Case,* no different construction can consistently be given the precisely similar finding in the *First Case;* for it is phrased in language essentially identical with that employed in the *Third Case.* If the finding in the *Third Case* constituted a finding of reasonableness, upon which a reparation order might be predicated, then the finding in the *First Case* was equally a finding of reasonableness; and the rates subsequently published and assessed by the defendants, which were in full conformity with that finding and with the order based thereon, were conclusively established as just and reasonable.

It has been asserted, however, that these two findings cannot be compared, because the finding in the *First Case* was made by the Commission in its legislative capacity, whereas the finding in the *Third Case* was quasi-judicial in character. That argument is without merit. The two findings, whether they related to the reasonableness of rates for the future or the past, were of similar character in that the Com-

mission, acting as a tribunal created by law and informed by experience, was undertaking to determine whether a rate complained of was in fact just and reasonable.

Compare this court's opinion in:

Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247,

in which it was said (at p. 258):

"Such orders so far as they are administrative are conclusive whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. *They are quasi-judicial and only prima facie correct insofar as they determine the fact and amount of damage* * * *. In considering *the administrative question as to reasonableness, the elements of the problem are the same whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion,* and the same necessity for having the matter settled by a single tribunal. * * * Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission, the carrier and shipper are alike bound to treat them as lawful. *After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the*

Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate past or present which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

As to past and present practices or allowances, the Commission has the same power and there is the same necessity to take preliminary action." (Emphasis ours.)

To the same effect, see the opinion of this court, in:

Great Northern Ry. Co. v. Merchants Elevator Co., supra (259 U. S., at p. 291).

Compare, also:

New York Central R. Co. v. N. Y. & P. Co. (1926), 271 U. S. 124.

Although one of the findings here contrasted was made as the prerequisite to an award of reparation, and the other as the necessary preliminary to the fixing of a future rate, both were made as determinations of the question of fact, which the Commission alone can determine, whether the particular rates complained of were just and reasonable. The essential similarity of the findings is not destroyed; and the conclusion is inevitable, that if one is interpreted as a finding of reasonableness, the other must also be.

(d) Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the First Case constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable.

It is shown (indeed, it is not disputed) that the rates applied upon petitioner's shipments were published and maintained in strict and literal conformity with the findings and the continuing order in the *First Case*. We have demonstrated that by that decision and order the Commission, in legal effect, fixed and prescribed the maximum reasonable future rate thereafter to be applied, until its further order. These two premises having been established, it necessarily and logically follows that the rates thus published by respondents, and applied to petitioner's shipments, were both in fact, and in legal contemplation, conclusively established as just and reasonable, and in conformity with the requirements of the Act; that the carriers' compliance with the order constituted a complete fulfillment of the obligation to maintain just and reasonable rates, imposed by Section 1 (4, 5) of the Act.

The question whether a rate is reasonable has been stated by this court to be a question of fact, to be determined by the Commission; and it has been invariably held that its determination must be treated as conclusive, and not subject to revision or correction by the courts, provided only that the findings are supported by substantial evidence, and the Commis-

sion has not exceeded constitutional or statutory restrictions, or committed any error of law. In:

I. C. C. v. U. P. R. R. Co. (1912), 222 U. S. 541,

this court said (at pp. 547, 548):

"* * * In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * *

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not be considered the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has as-

cribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In:

Western Paper Maker's Chemical Co. v. U. S. (1926), 271 U. S. 268,

this court said (at p. 271):

"The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive, if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law."

Other cases to the same effect include:

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294, 311;

Virginian R. Co. v. U. S. (1926), 272 U. S. 658, 665;

Keogh v. C. & N. W. Ry. Co. (1921), 260 U. S. 156.

Our opponents do not assert that the decision and order in the *First Case* were not validly and properly made, in the regular pursuance of the jurisdiction conferred by the Act. Indeed, it has never been alleged, and is not now contended, that that decision was not valid and lawful in every respect. The Commission itself, in the course of the order in the *First Case*, recited (R. 274) that the case had been duly heard and submitted *and that full investigation of the matters and things involved had been had.* It follows that the rate prescribed in the *First Case* was, in the light of the authorities cited, conclusively established as just, reasonable and lawful, and that the rates published by the respondents, in compliance with and in obedience to that decision and order, were therefore conclusively established as just, reasonable and lawful, during the period of the approved continuance and operation of the order.

II.

THE INTERSTATE COMMERCE ACT DOES NOT CONFER JURISDICTION UPON THE COMMISSION TO AWARD REPARATION FOR THE CHARGING OF RATES MAINTAINED AND APPLIED IN CONFORMITY WITH THE COMMISSION'S VALID OUTSTANDING FINDINGS AND VALID CONTINUING FORMAL ORDER.

(a) The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers.

The Commission's power to award reparation (damages) is specifically limited, by the very language of

the Act, to those cases where it appears that the person claiming damages has suffered injury through some violation of the Act, by a carrier subject thereto. Under Section 8 of the Act (49 U. S. C. A. 8) it is provided that in case any common carrier subject to the provisions of the Act shall do, or permit to be done, any acts, etc., prohibited or declared to be unlawful by the Act, or shall fail to perform any act required by the Act to be done, it shall be liable to the person or persons injured for the full amount of the damages sustained in consequence of such violation.

Section 9 of the Act (49 U. S. C. A. 9) provides that any person claiming to be damaged by any common carrier subject to the provisions of the Act may either make complaint to the Commission, or may bring suit for the recovery of the damages for which such common carrier may be liable under the Act, in a district court of the United States; providing further that the plaintiff shall not have the right to pursue both of such remedies, but must elect which of the two methods of procedure he will adopt.

Section 13 (1) (49 U. S. C. A. 13-1) provides that any person, etc., complaining of any act or omission on the part of a common carrier subject to the provisions of the Act, may make complaint to the Commission, and requires the Commission to receive such complaints and to undertake their investigation.

Under Section 16 (1) (49 U. S. C. A. 16-1) the Commission is empowered, if it shall determine, after

hearing held in accordance with the provisions of the preceding sections, that a complainant is entitled to an award of damages under the provisions of the Act *for a violation thereof*, to make an order directing the carrier to pay to the complainant the sum to which he is entitled.

Neither the Interstate Commerce Act, nor any other statute, provides that the Commission shall have power to entertain complaints or to award damages, except for violations of the Act. It has been repeatedly held that the Commission's power in this respect can be exercised only when a violation of the Act has taken place; that the only legal damage of which the Commission may take cognizance is that due to an infraction of the Act.

News Syndicate Co. v. N. Y. C. R. Co. (1927), 275 U. S. 179, 187; 72 L. ed. 225;

"The Commission had jurisdiction to determine whether plaintiff in error was entitled to 'an award of damages under the provision of this Act *for a violation thereof*'."

See, also:

New Pittsburgh Coal Co. v. H. V. Ry. Co. (1913), 26 I. C. C. 121, 126;

Pitwood v. N. P. Ry. Co. (1918), 51 I. C. C. 535.

(b) The Commission's determination in the First Case having been conclusive, respondents' compliance therewith completely fulfilled their obligation to maintain and apply reasonable rates upon petitioner's shipments. Their obedience to the Commission's findings and order could not, in legal contemplation, have been a violation of the Act, or give rise to any legal damage.

The reparation order upon which the petitioner's suit is based depends upon a finding made by the Commission in the *Third Case* (R., 307, 308) that the rates assessed and the charges collected upon its shipments, although published and applied in conformity with the Commission's outstanding valid formal findings and order in the *First Case,* were in reality unjust and unreasonable, and in violation of the requirements of Section 1 of the Act. In other words, the award rests upon a finding that respondents violated the law, and caused petitioner to be damaged, by assessing rates which were in strict conformity with, and in fact less than, the reasonable maximum rate which the Commission had authorized and prescribed by its direct affirmative findings and order in the *First Case.* This court is thus confronted with the astounding proposition that respondents can be declared to have violated the Act, and compelled to respond in damages therefor, although they have done the very thing which the Act itself, and the outstanding valid formal order of the Commission, authorized and required.

We may emphasize again that when the Commission in a formal proceeding reaches a determination

respecting the reasonableness of a particular rate and either approves the rate under review or prescribes for the future either the maximum, or minimum, or maximum and minimum rate to be thereafter observed, its determination is conclusive. The rate thus prescribed (or approved) is conclusively established as just, reasonable and lawful, by authority of the only tribunal having jurisdiction to decide the question of fact involved in the determination of what is a just and reasonable rate. There is only one final test of the reasonableness of a rate applying to interstate commerce, and that is an investigation, and the expression of an informed judgment thereon by the Commission. The decisions of this court above cited demonstrate that when such a determination is made by the Commission in the exercise of its lawful jurisdiction, it is final and conclusive. The rate approved or prescribed by the Commission is thereby determined for all purposes as a just and reasonable rate, provided only that the Commission acts within the scope of its powers, and does not proceed arbitrarily or unjustly, or without evidence to support its conclusions.

In view of the conclusive character of a valid determination made by the Commission, it would seem that the very statement of the proposition advanced by the petitioner and those who support its contentions is sufficient to condemn it absolutely. It will be borne in mind, and indeed our opponents concede, that carriers

are required to comply with affirmative orders of the Commission prescribing rates for the future. The fact is that a carrier's deliberate failure to comply with a formal order fixing a rate thereafter to be observed is, under the provisions of Section 16(7, 8) of the Act (49 U. S. C. 16 (7, 8); 41 Stat. 492) subject to heavy penalties. To construe the Act as empowering the Commission to declare, in a subsequent collateral proceeding, that a rate which it has previously examined and declared to be reasonable, and ordered observed as a maximum in the future, was "in fact" unreasonable, and that rates less than that maximum, voluntarily established and maintained in compliance with the order, were also unreasonable, would be to adopt and endorse the anomalous and extraordinary proposition that carriers can be declared to have violated the Act, and compelled to respond in damages therefor, although they have done the very thing which the law and the order of the Commission authorized, and indeed required them to do in order to escape severe penalties. The very statement of that proposition demonstrates its essential injustice and impropriety. It would be nothing less than a paradox —an utter monstrosity—for Congress to have conferred power upon the Commission to substitute its judgment for that of the carriers and to prescribe, with conclusive effect, the levels of rates for the future; and with the same enactment to provide that shippers might recover damages in subsequent collateral proceedings before the Commission, resulting in

orders enforcible in the courts, upon the theory that in complying with the conclusive orders of the Commission the carriers had nevertheless violated the statute which the Commission administers. The theory advanced by the petitioner and those who support its views is odious to every accepted standard of justice and fair dealing.

Our opponents nevertheless insist that there is a continuing duty, placed upon carriers by the Act, to see that their rates are at all times just and reasonable; and that this duty is not discharged by the publication and maintenance of rates which conform to a conclusive and continuing determination, previously made by the Commission, and endowed by law and by its own terms with continuing force and effect until thereafter changed. This contention absolutely loses sight of the fact that the determination of a reasonable rate for a particular service, when properly and validly made by the Commission, is conclusive upon the carriers, and cannot be disregarded by them. It is quite correct that the Act requires (Section 1, (4, 5)) that all rates be just and reasonable; but it also empowers the Commission to determine finally whether a particular rate conforms to that standard and if not, to say "what will be the just and reasonable * * * rate to be thereafter observed."

As this court has many times stated, the Commission, when it prescribes a rate "to be thereafter observed" and maintained, acts in its legislative capacity. It establishes, in the same manner as if the

Congress itself had enacted a specific statute, what the reasonable and lawful rate in the premises will be. The carriers' compliance with that legislative determination cannot be in violation of the law: by its very terms, it cannot be other than a direct compliance with the statutory requirements.

Our opponents urge, however (Petitioner's Brief, p. 39; Brief for I. C. C., pp. 10-18), that even though the Commission may have taken affirmative action to prescribe a particular rate as reasonable, it is the duty of the carriers to take into account changes of conditions which may subsequently occur and to revise their rates accordingly, and that this duty persists irrespective of the continuing effect given by the statute to the Commission's legislative orders. This contention ignores the fact that the Commission's determination of the reasonableness of a particular rate, if validly made, is absolutely conclusive. By the terms of the statute it fixes the rate "to be thereafter observed" as long as its order is effective. If our opponent's argument were sound, the carriers would equally be entitled, and even required if changed conditions warranted, to increase a rate prescribed by the Commission as a maximum reasonable rate, without any authority from the Commission. It is as reasonable to suppose that changed conditions would justify an increase of a particular rate as to assume that its reduction would be required. But of course the carriers have no such option. As long as an affirmative order continues in effect, it must be ob-

served; and the maximum therein prescribed will continue to represent the maximum which the carrier may charge, no matter how great an advance might be justified by changed conditions. Certainly if the carrier has no option to advance a rate, except by approval of the Commission, it should not be required, as an affirmative obligation imposed by Section 1 of the Act, voluntarily to reduce a rate below a standard set by the Commission "to be thereafter observed"; especially since that determination, insofar as the carrier is concerned, is final and conclusive.

It has several times been observed by this court that findings of fact as to the reasonableness or unreasonableness of a particular rate, under complaint for purposes of reparation, inure to the benefit, not merely of the particular shipper by whom the complaint is brought, but of all other shippers who have made shipments under the rate assailed and have paid and borne charges thereon. In

Phillips v. Grand Trunk W. Ry. Co. (1913), 236 U. S. 662,

this court said (at p. 665):

> "But the proceeding before the Commission, to determine the reasonableness of the two-cent advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern, in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was

> general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. * * * The plaintiff and every other shipper similarly situated was entitled by appropriate proceeding before the Commission or the courts to obtain the benefit of that general finding and order."

Compare also

> *Mitchell Coal Co. v. Pa. R. R. Co.*, supra (230 U. S. 247, 258),

(to which reference has already been made) in which this court said:

> "Such orders (of the Commission), so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order."

These decisions make it quite clear that findings of the Commission as to the reasonableness of a particular rate, when properly made as the foundation for awards of reparation, are conclusive and binding, not merely upon the shippers and carriers directly involved in the proceeding, but upon all shippers and carriers who may be affected by the ruling. Particularly, they establish that every shipper may, by appropriate proceedings, obtain the benefit of such findings, which constitute the conclusive meas-

ure of his rights and of the carrier's correlative obligation in the premises. But if such conclusive effect is given to rulings of the Commission as relating to past rates, equally its rulings as to rates to be observed for the future should be regarded as constituting the conclusive measure of the rights of the shippers, as long as those rulings continue in effect without modification, and as determining for their effective period the extent of the obligation imposed upon the carrier to maintain and charge just, reasonable and lawful rates.

Our opponents assert (Petitioner's Brief, pp. 47, 51) that the decision of the court below denying to the Commission jurisdiction in the premises rests upon no express provision of the Act, or of any amendment thereto; and contend that if the Commission has been deprived of jurisdiction, heretofore given by the Act, to award reparation for the collection of rates prescribed by the Commission, that deprivation must arise by implication from some amendment to the Act, for there has been no outright change such as to authorize the conclusion reached by the court below. That contention is quite erroneous. The decision of the court below rests upon the *express* provisions of the Act, which limit the Commission's jurisdiction to award reparation to those cases in which it is made to appear that the carrier has violated the terms of the statute, and has thereby caused damage to a shipper. The Act has never conferred upon the Commission jurisdiction to award reparation for a carrier's com-

pliance with and obedience to the statute. The carrier's obedience to a conclusive and continuing order prescribing the maximum reasonable rate thereafter to be charged, necessarily results in the maintenance and application of rates which, as measured by the only final standard which the law of the land recognizes, are just and reasonable. There can be no violation of the Act, under such circumstances; and consequently, there is nothing to which the Commission's jurisdiction to award reparation may attach.

Our opponents' basic contention is equivalent to the assertion that the carriers' obligation under Section 1 cannot be measured by the final and continuing conclusion reached by the Commission pursuant to the provisions of Section 15 (1), after full and complete investigation into the particular circumstances involved. In effect they say that the definite pronouncement of the Commission, the only body having power to make a final determination in the premises, cannot be accepted by the carriers as the definite guide to their duty. They advance this argument even though they admit that the Commission is vested with final authority, and that there is no appeal from its conclusions upon administrative questions, and matters of fact, except upon jurisdictional or constitutional grounds. Our opponents have not cited any decision sustaining this contention, or holding that a carrier's compliance with a definite binding conclusive order of the Commission does not discharge the obligation to charge reasonable rates, placed upon

it by the statute. We are confident that no such decision has ever been rendered. There are, however, numerous authorities which indicate a contrary view. The very recent decision of this court in:

Atlantic Coast Line R. R. Co. v. Powe (1931), 283 U. S. 401; 75 L. ed. 1142,

is particularly in point.

The case involved a suit for damages for the death of a railroad employe, brought under the provisions of the Federal Employer's Liability Act, the only negligence asserted being that a certain semaphore standard had been placed too near the railroad track. It appeared that the Railroad Commission of South Carolina, acting pursuant to lawful authority, had as a safety measure prescribed a general rule that semaphore standards and other similar structures should not be placed nearer than 4 feet from the outer edge of the rail. The semaphore in this instance was some 4 feet 10 inches distant from the top of the rail. This court said:

"It will be seen that the railroad company in this case more than complied with the order. It is true that four feet was a minimum distance, but it satisfied the requirement of the Commission, and *it would be going far to say that the railroad company was not warranted in supposing that it had done its duty so far as the Commission was concerned when it put the semaphore four feet and ten inches away.* * * * The question is not whether a reasonable insurance against such mis-

fortunes should be thrown upon the traveling public through the railroads, but whether the railroad is liable under the statute according to the principles of common law regarding the tort. No negligence is proved against the petitioner."

In the instant case it is undisputed that the respondents "more than complied" with the Commission's affirmative order. The 96½-cent rate was set as a reasonable maximum; and it is utterly illogical to say that the carriers (and this court) are not warranted in the conclusion that respondents fully discharged their duty under the Act, when they published and maintained rates which "more than" satisfied the Commission's requirements, in that they were actually lower than the reasonable maximum fixed by the Commission's continuing order.

The decision in

United States v. New River Co. (1924), 265 U. S. 533,

is likewise closely in point. The case involved a suit brought to enjoin certain carriers from applying a certain rule (Rule 4 of Circular CS-31, Revised) for the distribution of coal cars, and to set aside the Commission's decision and order in *Bell & Z. Coal Co. v. B. & O. S. W. R. Co.*, 74 I. C. C. 433.

In that proceeding the Commission made findings as follows:

"The present facts considered, we do not conclude upon these records that the rule attacked

rule 4 of Circular CS-31, Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the *Fairmont cases*, based upon a mistaken adherence to and extension of the decision in the *Illinois case*, are reversed. The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect." (74 I. C. C. 433, 443.)

The Commission thereupon made a formal order, reciting that it had "made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof. It is ordered that the complaints in these proceedings be and they are hereby dismissed". Following the report and order of dismissal, the defendant carriers gave notice that they would put rule 4 in effect. Thereupon suit was brought to enjoin the carriers from applying the rule and to set aside the decision and order of the Commission. The District Court held that the order of the Commission was in substance and effect affirmative, i. e., the same as if the order had been affirmative in form; but it also held that the rule was unlawful and issued an injunction, from which the United States and the Interstate Commerce Commission appealed. The carriers did not appeal. This court was called upon to decide whether the order of the Commission was subject to

review by the District Court; and if so, whether it should be set aside.

In holding that the order was subject to review, this court said (p. 541):

> "The Commission reversed its former findings and decided in favor of rule 4, and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. *Clearly, the order permits and authorizes the carriers to apply rule 4 * * *. Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150% rule.* The effect of the order is to grant the relief sought by the operators of the local mines." (Italics ours.)

The decree of the lower court was reversed upon the ground that as the Commission's jurisdiction over the subject matter was exclusive, the courts would not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions, citing numerous cases.

As applied to the case at bar, the principle followed in the *New River Case* definitely establishes that the Commission, by its order in the *First Case*, "clearly permitted and authorized"—indeed, required—the carriers to apply a rate not exceeding 96½ cents. It was "the plain intent and purpose of the Commission" that rates observing that figure as a reasonable maximum "should be applied". The Commission's determination was conclusive, as long as effective, for

it was unquestionably valid; and under the rule of the cited case, it was not subject to collateral review as to its wisdom or expediency. It became the conclusive measure of the carriers' duty under the act, so far as a reasonable rate for the particular service in question was concerned; and their compliance with the order therefore completely discharged their statutory duty in the premises.

We conclude that the respondents' publication and collection of rates in compliance with the Commission's conclusive and continuing determination in the *First Case* completely fulfilled their obligation to maintain just and reasonable rates, for the rates which were thus published and applied were, during the period of approved operation of the Commission's order, conclusively established as just and reasonable. It follows that the carriers committed no violation of the Act in the premises; and since the Commission's jurisdiction to award reparation must depend upon a violation of the Act, the Commission was without jurisdiction to make the order sued upon, which is therefore void and of no effect.

(c) All the reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary.

While the instant case is the first in which this court has been called upon to determine directly the question whether the Interstate Commerce Commission

may validly award reparation against rates published and maintained in conformity with its valid findings and valid continuing formal order, the same or a substantially similar question has arisen in cases heretofore decided by the inferior federal courts and the highest courts of several of the states. In every case those courts have declared that a regulatory commission, exercising jurisdiction similar in general to that exercised by the Interstate Commerce Commission, cannot validly award reparation for the collection of rates published and applied pursuant to its approval and authority. Moreover, this court, in at least two of its decisions, has indicated that there can be no right to reparation for the collection of charges published and applied by authority of the Interstate Commerce Commission.

(1) *Decisions of this court supporting respondents' contentions.*

We call particular attention to this court's decision in:

Keogh v. C. & N. W. Ry. Co. (1921), 260 U. S. 156 (already cited).

In that proceeding a shipper attempted to recover damages from various railroad companies, for asserted violations of the Sherman Anti-Trust Act, it appearing that the railroads, acting in concert through an association to which they all belonged, had published and assessed uniform rates upon the plaintiff's interstate traffic. The rates in question had been investigated, and approved or prescribed, in a number of

formal proceedings before the Interstate Commerce Commission. As this court took pains to state, the instrument by which the plaintiff was alleged to have been damaged consisted of rates approved by the Commission.

This court held that the plaintiff had no cause of action, as asserted. After stating that the rates in question were fixed as reasonable and non-discriminatory, by virtue of the proceedings before the Commission, it said:

> "What rates are legal is determined by the Act to Regulate Commerce. Under Section 8 of the latter Act the exaction of any illegal rate makes the carrier liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages, either by complaint before the Commission or by an action in a Federal Court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. * * * Can it be that Congress intended to provide the shippers from whom illegal rates have been exacted with an additional remedy under the Anti Trust Act? *And if no remedy under the Anti Trust Law is given, where the injury results from the fixing of rates which are illegal because too high or discriminatory, may it be assumed that*

Congress intended to give such a remedy where as here the rates complained of have been found by the Commission to be legal and, while in force, had to be collected by the carrier?

"Section 7 of the Anti Trust Act gives a right of action to one who has been injured in his business or property. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes the legal rate as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." (Emphasis supplied.)

This court also directly compared the right of action asserted by the plaintiff with that relied upon in cases where shippers seek to recover damages under the Interstate Commerce Act, saying:

"Under Section 7 of the Anti Trust Act, as under Section 8 of the Act to Regulate Commerce * * * recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. Here the instrument by which the damage

is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers."

The instant proceeding presents a direct parallel to the *Keogh Case*. Here the petitioner is alleged to have been damaged by the assessment of a rate which had previously been prescribed by the Commission, and continued in effect in accordance with the Commission's conclusive formal order. In the *Keogh Case* this court held that no legal damage was inflicted upon the shipper under analogous circumstances: that no wrong had been committed by the carriers, upon which an action sounding in tort could be predicated, by their collection of the rates approved by the Commission. The same principle should govern the instant case: that is, this court should conclude that no wrong, giving rise to a right to damage, can have been committed by respondents in collecting rates which had the Commission's stamp of approval when charged, and were in fact maintained and applied by respondents in conformity with a conclusive formal continuing order of the Commission, validly issued pursuant to the provisions of the Interstate Commerce Act.

In:

S. P. Co. v. I. C. C. (1911), 219 U. S. 433, (already cited)

this court had under consideration the validity of an order of the Commission prescribing certain reduced

rates for the future. At the conclusion of its opinion this court said (219 U. S., at p. 452):

> "The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law, the order of the Commission has spent its force, and therefore the question for decision is moot. * * * It is to be observed that clearly the question is without merit *in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined;* and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (Emphasis supplied.)

We direct particular attention to the italicized portion of the foregoing quotation. That expression can only be understood to mean that if the legality of the order were affirmatively determined, there could be no possible liability for reparation to which the railroads might be subjected: their compliance with a legal and valid order of the Commission establishing the rates to be charged could not create any right to reparation for the assessment of charges predicated upon the rates thus prescribed.

(2) *Decisions of state courts and inferior federal courts which support respondents' contentions.*

The earliest decision of any court, state or federal, with which we are familiar, in which an issue similar to that here raised was presented, was rendered by the United States Circuit Court for the Western District of Missouri in:

Winsor Coal Co. v. C. & A. R. Co. (1892), 52 Fed. 719.

It was there held that a rail carrier was not liable, under a state statute permitting a recovery of a penalty for the exaction of an unreasonable freight rate, where it appeared that the Missouri State Commission was required by law to see that all schedules of rates adopted by common carriers were reasonable and just, and that the defendant carrier had in fact published rates in conformity with the determination thus made by the state tribunal.

Very recently, the United States District Court for Arizona (three judges sitting) has permanently enjoined the Arizona Corporation Commission from enforcing an order directing the payment of reparation for the collection of intrastate freight rates which had been approved and/or prescribed by the Arizona Commission, prior to their application and collection. The decision is reported as:

E. P. & S. W. R. Co. v. A. C. C. (July 20, 1931), 51 Fed. (2d) 573.

The following excerpt from the court's opinion is particularly pertinent:

> "We are convinced that when the Arizona Corporation Commission has approved and authorized a rate to be collected, and the carrier has collected that rate and nothing in excess thereof while the rate was in force, the Commission has no authority to order a reparation, even though it should thereafter find, as it did in this case, that the rate so prescribed was excessive. The same rule applies to rates fixed by the Interstate Commerce Commission (*Atchison, T. & S. F. Ry. Co. v. Arizona Grocery Co.* (C. C. A.) 49 F. (2d) 563)."

The decision of the Supreme Court of Washington in:

N. P. Ry. Co. v. Department of Public Works (1925), 136 Wash. 389; 240 Pac. 362,

is likewise closely in point in the instant case.

Under the statutes of Washington, carriers are charged with the duty of initiating their rates, subject to review upon complaint by the state regulatory body. It is also provided that the state tribunal may, upon complaint, and after investigation, require a public utility company which has charged an unreasonable rate, etc., to refund the difference between the rate so charged and that which would have been reasonable for the service. That section of the statute is the obvious correlative of similar provisions of the

Interstate Commerce Act which provide that the Interstate Commission may award damages for violations of the Act as a result of which shippers are injured. The Washington statute also contains a provision, similar to that found in Section 1, (4, 5,) of the Interstate Act, requiring charges made for any service rendered in the transportation of persons or property by carriers to be just, fair, reasonable and sufficient. In other words, the legal requirements and the procedure contemplated in Washington are substantially equivalent to those laid down by the Interstate Commerce Act.

In this proceeding, it appeared that the carriers had complied with a prior order of the Department of Public Works prescribing the method of measuring cordwood for purposes of transportation. Subsequently a second complaint was filed, and the Department revised its prior determination, and found that the method of measurement previously prescribed resulted in unreasonable charges. It prescribed a new method, the effect of which was to reduce such charges. It also found that the carriers' charges, assessed upon the basis prescribed in the first decision, had been unreasonable, and that the shipper was entitled to recover the difference. In short, the situation differed in no essential respect from that presented in the instant case, for it was admitted that the carriers had complied with the first order issued by the state tribunal, just as it is established here that

the defendants duly complied with the Interstate Commission's order in the *First Case.*

The Supreme Court of Washington held that there was no right to reparation or refund under the circumstances. It said:

> "During that time the carriers complied strictly with the order of the department, and after the effective date of the second supplemental order apparently complied strictly with the order basing measurement of short lengths of wood piled loosely in racked cars at 192 cubic feet per cord.
>
> "It is manifest, therefore, that since all the shipments complained of by the Roosevelt Transfer & Fuel Company were received during the period when the department order was in force fixing the standard at 128 cubic feet per cord, there was nothing illegal in what appellant did. The rates and standards were in force, and while in force were the only lawful rates and standards. *C. B. & Q. R. Co. v. Merriam* (C. C. A. 8) 297 F. 1. The orders of the department were prospective and in no way retroactive by their own terms.
>
> "The statutes governing the procedure are sections 10433 and 10434, Rem. Comp. Stats. The first provides:
>
> > 'When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the com-

mission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.'

"The second section reads:

'The director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in all cases where any public service company, as defined in this chapter, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge is made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid. * * *'

"Appellant contends that under section 10433, supra, the complaint of the Roosevelt Transfer & Fuel Company did not state a cause of action, and the evidence before the department and the trial court does not warrant any relief.

"Respondent relies upon section 10434, supra, and also upon section 10345, which contains a provision to the effect that:

'All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more

common carriers, shall be just, fair, reasonable and sufficient.'

"Respondent therefore contends that under section 10434 and section 10345, the rate, in order to be lawful, must not only be the rate found in the tariff of the carrier on file with the department, but must also be 'just, fair, reasonable, and sufficient,' and that section 10434, supra, is designed to include rates charged unlawfully on either ground and is not restricted to the overcharge of a tariff rate.

"We cannot accept the construction of respondent. Section 10434, supra, specifies charges for services rendered 'in excess of the lawful rate in force at the time such charge was made.' The charges here made were not in excess, but in conformity, with the lawful rate in force at the time they were made. That section also refers to charges which may 'thereafter be declared to be the legal rate which should have been applied to the service rendered;' and this, respondent thinks, is sufficient to justify the action of the department.

"That provision evidently deals with complaints as to charges exacted by carriers which have never been adjudicated, and upon which the department was authorized to find the reasonable charge for such past service, and make it both prospective and retroactive, and provide for reparation. It certainly does not authorize the department to make an order at one time to operate only prospectively, and to return to the same subject-matter later, after the carriers have complied with the order of the department, and award

reparation of charges legally established, as unjust and unreasonable.

* * * * * * *

"While the previous order was in force the presumption obtained that the standard of 128 cubic feet per cord was a reasonable standard which carriers were obliged by law to observe. That is what appellant did in this case, and *it seems to us that it is not to be penalized for complying with the effective orders of the department.* Under other statutory provisions they were liable to prosecutions and fines for noncompliance." (Italics ours.)

It is impossible to avoid the persuasive force of this decision. It was rendered under circumstances so closely analogous to those presented in the present case that no real distinction can be drawn. It definitely and squarely upholds the principle for which we contend: namely, that a carrier which, in good faith, complies with a valid continuing order of the commission, and published and establishes rates which conform to the spirit and terms of that order, is not to be penalized as a violator of the statute, through the medium of reparation awards, for having obeyed the law and performed its legal duty in the premises.

Other decisions of state courts in which substantially similar conclusions have been reached include:

M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680;

Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608;

Miller Mill Co. v. L. & N. R. Co., 207 Ala. 252;
Young Co. v. Payne, 127 Miss. 48;
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059;
Bonfils v. Public Utilities Comm., 67 Colo. 563.

Our opponents are familiar with these decisions of the state and federal courts, and have attempted to distinguish the situations there involved. They point to the fact that the state tribunals ordinarily are charged, either by state constitution or by statute, with the primary duty of initiating all rates of carriers subject to their jurisdiction, whereas under the federal act the carriers themselves initiate their rates, which are, however, subject to review and correction by the Federal Commission, either upon the complaint of interested shippers or upon the Commission's own motion. It may be noted initially that this attempted distinction does not apply to the *Northern Pacific Railway Company Case*, supra, decided by the Supreme Court of Washington, for in that state the procedure by which rates are fixed is substantially the same as that followed in interstate commerce; that is to say, the carriers themselves initiate their rates, and those rates become Commission-made only after they have been subjected to review, and are either approved or changed by the governmental tribunal.

In any event, however, the attempted distinction is wholly without merit. In those states where a rate cannot be effective until first submitted to and approved by the state commission (which includes Texas,

Virginia, Louisiana, Alabama, Mississippi and Arizona, referred to in the decisions cited), the action of the state commission is conclusive, and a rate thus approved or prescribed becomes, for all purposes, the reasonable and lawful rate thereafter to be applied until further order. It matters not that that characterization applies to *all* rates, and that no rate can become effective until it has been submitted to and approved by the state tribunal. A rate upon interstate traffic which has been submitted to and approved by the Interstate Commission, or is the result of a direct affirmative continuing order of the Interstate Commission, is likewise conclusively established as a just, reasonable and lawful rate. In short, there can be no distinction between a rate established pursuant to a general jurisdiction, under which the regulatory body is required to prescribe and approve all rates, and one which becomes effective pursuant to the exercise of a jurisdiction of review, in the course of which it has been subjected to particular examination. In fact, the latter rate, having been subjected to particular and individual inquiry, is more to be regarded as conclusively just and reasonable, and thus not subject to retroactive reduction for the purpose of reparation.

The decisions above referred to include all the reported cases of which we have knowledge, in which the courts have dealt directly with the point here in issue. Regardless of our opponents' attempts to explain away

these decisions, they cannot escape the fact that they unanimously support the principle for which we contend; namely, that those portions of the Interstate Commerce Act which empower the Commission to award damages for a carrier's violation of the statute do not purport to give the Commission jurisdiction to award reparation for the charging of a rate which has previously been expressly prescribed or approved, and declared to be reasonable, and which a carrier has been authorized to charge by a formal continuing order by the Commission itself. We have been unable to find any reported decision (and our opponents have failed to cite any such decision, at any stage of this case), in which this court, or any inferior court, has ever approved or sustained an award of reparation made by a regulatory commission, for the collection of a rate which that commission has either prescribed or approved for future application, or where the rate charged was less than a rate so fixed or approved: regardless whether such prescription and/or approval was the result of a general statutory jurisdiction requiring all rates to be approved before being placed in operation, or resulted from the investigation of a particular rate.

(3) *Discussion of decisions relied upon by petitioner and amici curiae supporting petitioner.*

Several cases are cited by our opponents to support their contention that the Commission has power to

award damages for the collection of a rate which it has prescribed or approved by formal continuing order. The first of these is this court's decision in:

Reagan v. Farmer's Loan and Trust Co. (1894), 154 U. S. 362.

A very brief examination of that case will show that it does not in any sense support the assertions of our opponents. In the *first* place, the precise issue was whether representatives of a railroad company might, by suit in the federal courts, enjoin the enforcement of rates prescribed by the Texas Railroad Commission for application upon Texas intrastate traffic, the basis for the suit being that the schedules in question were so unjustly and unreasonably low as to work a substantial destruction of the carriers' property rights. No question of the reparation powers of the Texas Commission or of any other Commission was involved at all. The only issue was whether the injunctive power of the federal courts might be invoked to restrain the further operation of the entire intrastate schedule of rates, "and not of any particular rate upon any class of goods" (154 U. S., at p. 400).

In the *second* place, this court could not possibly have considered, even for purposes of illustration, the question whether the Interstate Commerce Commission possessed any power to award reparation, as to rates which it had previously prescribed. The litigation arose in 1891 and 1892, and the decision was ren-

dered in 1894. At that time the Interstate Commerce Act did not confer upon the Commission any power to prescribe reasonable rates for the future. Jurisdiction in those respects was not conferred until the enactment of the *Hepburn Amendment of 1906* (34 Stat. 584).

In the *third* place, the expressions in the opinion in the *Reagan Case* upon which our opponents rely, if properly studied and construed in conjunction with the remainder of the opinion, support our position in the instant case and deny the very jurisdiction which petitioner seeks to assert on the part of the Commission. *Finally*, even if those expressions could possibly be construed as contended by our opponents, they are dicta which conflict with later pronouncements of this court: e. g.,

T. & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426, 448;
Mitchell Coal Co. v. Pa. Ry. Co., supra;
Phillips v. Grand Trunk Western Ry. Co., supra.

We call especial attention to the expressions found in the opinion in the *Mitchell Case* (230 U. S., at p. 259).

The fact that the Commission, at the time of the decision in the *Reagan Case*, had no power to prescribe rates for the future renders any expression in the opinion, even if construed as relating to the sup-

posed power to award reparation against Commission-made rates, pure dictum and of no controlling force. Of course, pronouncements of this court, even though by way of dicta, are entitled to the greatest respect; but this court has frequently declared that its dicta cannot be regarded as controlling, when cited upon an issue which was not, and in the very nature of things could not have been, presented to or even considered by the court.

Webster v. Fall (1925), 266 U. S. 507;
Wolff Co. v. Industrial Court (1925), 267 U. S. 552.

Our opponents also refer, particularly in petitioner's brief (pp. 28, 44-46), to this court's decision in:

T. & P. Ry. Co. v. Abilene Cotton Oil Co., supra,

as supporting their position. Careful analysis of the opinion, particularly the portions quoted by petitioner, reveals that they do not sustain its contentions in any respect. The essential question there before this court was whether an action at law for the damages sustained by the charging of an unreasonable interstate rate might be brought in a court of competent jurisdiction, without preliminary resort to the Interstate Commerce Commission; or whether there must first be an investigation and determination of the administrative question involved (i. e., the reasonableness of the rate attacked) by the Commission, before proceedings in court could be commenced. This court held

that there must be such preliminary resort to the Commission; that the Commission's power extended to the awarding of reparation in favor of individuals who might have suffered from the application of an unreasonable schedule of rates, although the unreasonable schedule was not, at the date of the complaint, in force any longer. In other words, the court simply held that even though an unreasonable schedule of rates, duly published in carriers' tariffs, might have been changed for the future either by voluntary action of the carriers or as a result of an affirmative order for the future by the Commission, the Commission would still have power to consider complaints and to award reparation for damages sustained by the charging of the unreasonable rates during the period preceding the change. There is no suggestion that the question of reparation against rates prescribed as reasonable by the Commission, and published by carriers in conformity with its valid findings and orders, was presented to or considered by the court, even for purposes of illustration. In fact, in 1901, when the litigation arose, the Commission had no power to prescribe reasonable rates for the future, and did not receive such power until 1906. The sole question was whether resort must be had to the Commission, by a shipper endeavoring to obtain reparation against carrier-made (not Commission-made) rates which, though reduced for the future, had been applied to shipments moving prior to the reduction. The decision not only lends no support to petitioner's argument; on the contrary, to

the extent that it bears at all upon the essential issue here presented, it is an authority in our favor, for it directly establishes that the Commission's power to award reparation is capable of exercise only when it appears that a carrier has violated the Act, and has thereby caused damage to a shipper.

Our opponents likewise refer, apparently with some confidence, to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Co. v. Southern Ry. Co. (July 21, 1931), 51 Fed. (2d) 443 (already cited).

While that case involved circumstances which, in our opinion, present some similarity to the instant case, the decision of the court is in no sense in conflict with the principle for which we contend, or with the decision of the Circuit Court of Appeals for the Ninth Circuit here under review. The question involved in the *Eagle Case* was in a sense twofold: *first*, whether the rate charged upon the shipments involved for purposes of reparation was, upon the facts shown, a rate prescribed or approved by the Commission; and *second*, whether, if the rate in question was a Commission-made rate, the Commission's order awarding reparation for its collection was valid and enforceable. The opinion recites the essential facts, and shows that the court concluded that the rate in question, as applied to the plaintiff's shipments, was not "Commission-made"; that is to say, it was not maintained and applied pursuant to, or in conformity with, an out-

standing and continuing formal finding or order of the Interstate Commerce Commission. The court therefore said:

> "Having reached this conclusion (that the rate in question was not Commission-made) it is not necessary in this case to decide, and we do not decide, whether or not the power of the Commission to award reparation extends to rates of its own making. The decision of the Circuit Court of Appeals for the Ninth Circuit in *A. T. & S. F. Ry. Co. et al. v. Arizona Grocery Co.*, 49 Fed. (2d) 563, to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission, upon a valid finding that it was excessive, had the power to award reparation."

Our opponents also refer to the separate concurring opinion of Judge Hutcheson in the *Eagle Case*. While that opinion is, of course, entitled to respect, it cannot be regarded here as a precedent; for it is not the opinion of the court, and did not receive the concurrence of Judge Hutcheson's associates, who did not disagree with the opinion of the Ninth Circuit Court herein.

Some reference is made in the argument of our opponents to decisions of the Interstate Commerce Commission in which it has undertaken to assert that it possesses jurisdiction to award reparation against

rates of its own making. However, it can hardly be argued, with any sense of propriety, that the Commission's conclusion upon a question of law (i. e., as to its own jurisdiction upon a particular state of facts) is conclusive and binding. The leading decision by the Commission upon which our opponents rely is that rendered in the *Third Case*, out of which this particular litigation arises. The argument that that decision should be accepted as a conclusive authority here simply begs the question, for it assumes that the Commission has correctly answered the very question which is now before the court, and that its answer must be regarded as controlling. Neither this court, nor the inferior federal courts, have ever regarded the Commission as the ultimate arbiter of questions of law arising under the Interstate Commerce Act. They have frequently reversed the Commission's conclusions upon such matters, particularly as relating to the powers conferred upon it by the statute. Compare, for example:

U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269;
S. P. Co. v. I. C. C., supra;
U. S. v. N. Y. C. R. Co., supra;
Ann Arbor R. Co. v. U. S., supra;
Hohenberg v. L. & N. R. Co. (1931), 46 Fed. (2) 952; certiorari denied, No. 70, Oct. term, 1931.

(4) ***Discussion of grounds upon which Commission's assertion of jurisdiction in the Third Case was based.***

It is appropriate at this point again to refer somewhat briefly to the Commission's opinion in the *Third Case,* particularly to the portions thereof (R. 306, 307; 140 I. C. C. 171, at p. 180) wherein the Commission seeks to explain and justify its assertion of power to award reparation against the rates which it had itself previously prescribed in the *First Case.*

It will be observed that the Commission did not, in the *Third Case,* declare either expressly or by implication that conditions had changed to such an extent as to place the carriers on notice that the rates previously authorized had become unreasonable "in fact"; furthermore, it did not attempt to fix any date at which the Commission-made rates prescribed in the *First Case* had become unreasonable. It did not assert that the rate prescribed in the prior case was only a "maximum" rate (and not a reasonable rate), as petitioner contends; on the contrary, it recognized that in the *First Case* it had undertaken to prescribe a *reasonable* rate.

All that the Commission did was to make a collateral attack upon its prior findings, and to say, in support of that action: *first,* that it was not bound by the doctrine of *res adjudicata;* and *second,* that it reserved the right, upon a more comprehensive record, to modify previous findings when it appeared that such findings would not accord substantial justice under the law which it administers.

We may emphasize again that the doctrine of *res adjudicata* was not and is not involved. The Com-

mission's reference to its freedom from the necessity of observing that rule was wholly inapposite. It is not and never has been contended that the Commission's legislative order in the *First Case*, once made, must for all time stand unchanged, or control future proceedings in which the same subject matter might be involved. It is conceded that changes of that legislative order might be made, if in the Commission's opinion changed conditions or other circumstances warrant; but, of course, such changes must also be legislative in character, and therefore prospective in operation only.

The Commission's assertion that it reserves the right to modify previous findings, and to give retroactive effect to that modification, of course can have no weight, unless the power is constitutionally vested in the Commission by the statute.[1] The Commission says that the record before it in the *Third Case* was for the first time comprehensive in the evidence which it contained bearing upon the reasonableness of the rates assailed. That statement is not founded upon any fact of record, for the record in the former case was not before the Commission when the *Third Case* was decided. In any event the statement amounts in substance to the assertion that upon a different record, now before it, the Commission is of opinion that it made a mistake before, which it reserves jurisdiction to correct. The conclusion which necessarily follows, if the Commission's argument is sound, is that a carrier cannot rely upon any order of the Commission purporting to pre-

(1) *Brimstone R. & C. v. U. S.*, 276 U. S. 104 (already cited).

scribe a reasonable rate, except at its peril of being found guilty of an infraction of the statute, and compelled to respond in damages, if the Commission subsequently changes its mind in a collateral proceeding. The order in the *First Case* recites that it was made after full hearing and investigation: a recital of fact which the Commission completely ignored in asserting that in the *Third Case* it was for the *first* time possessed of a comprehensive record. If the Commission was correct in ignoring that recital, and in asserting the retroactive power which it undertook to exercise, there is nothing to prevent it from entertaining still another complaint involving the same subject-matter, and concluding that its findings in the *Third Case* were based upon an incomplete record, and that a further retroactive readjustment is necessary; and so on, *ad infinitum*.

The essential lack of equity inherent in the exercise of this asserted retroactive power is forcefully illustrated by the decision in the *Third Case*. In the *Second Case* the Commission reduced the rate from northern California points to Phoenix to 71 cents, from and after February 25, 1925. That rate was duly published, and continued in effect until the decision in the *Third Case*. In the *Third Case* the Commission found that it had erred in prescribing the 71-cent rate, and that a proper rate in the past should have been 73 cents from northern California points; and the lack of equity arises from the fact that while the Commission found that during a part of the period preceding its last order, a rate of 73 cents would have

been reasonable, nevertheless the law provides no machinery by which the carriers could recover the difference. They were without any remedy whatsoever.

It should also be noted that the Commission's conclusions as to its jurisdiction, announced in the opinion in the *Third Case,* as well as in the various cases referred to in its brief (at p. 20) filed herein as Amicus Curiae, are in direct conflict with numerous other decisions in which it has recognized that no right to reparation exists, where it appears that the rates attacked are equal to or less than those which it has previously approved or prescribed. Compare, for example:

Morrell & Co. v. N. Y. C. R. Co. (1927), 120 I. C. C. 537, 544;

Eastern Livestock Cases (1928), 144 I. C. C. 741, 781;

Rate-Structure Investigation—Iron and Steel Articles (1929), 155 I. C. C. 517, 567;

National Petroleum Assn. v. M. K. & T. Ry. Co., et al. (1917), 47 I. C. C. 355, 363;

Ariz. Lumber Co. v. A. E. R. Co., et al. (1925), 96 I. C. C. 203, 206;

National Coffee Co. v. G. C. & S. F. R. Co., et al. (1924), 92 I. C. C. 14, 16;

Oklahoma Corp. Comm. v. A. & S. R. Co., et al. (1925), 101 I. C. C. 116, 132.

We ask this court to conclude, consistent with the uniform current of pertinent judicial authority, that

the Act is not to be construed as conferring upon the Commission jurisdiction to award reparation with respect to shipments which have moved under rates published in conformity with its valid formal findings and valid continuing formal order establishing the reasonable rates thereafter to be observed; and that the reparation order which forms the basis of petitioner's suits is therefore invalid and unenforceable.

III.

IF THE ACT WERE SO CONSTRUED AS TO CONFER UPON THE COMMISSION POWER TO AWARD REPARATION UNDER THE CIRCUMSTANCES HERE PRESENTED, IT WOULD TO THAT EXTENT BE UNCONSTITUTIONAL AND VOID, IN CONTRAVENTION OF THE DUE-PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution of the United States, insofar as material here, provides simply that "no person shall be * * * deprived of * * * property without due process of law". It is our position that if the Interstate Commerce Act were to be construed as conferring upon the Commission jurisdiction to award reparation against rates equal to or less than a rate which the Commission has itself prescribed or approved as a reasonable maximum, it would to that extent be unconstitutional and void, in that respondents' lawfully acquired property would be taken without the observance of the due process of

law guaranteed by the amendment. It may be observed, in this connection, that the Circuit Court in its opinion (R., 454, 455) has declared that this point is well taken, although it has not decided that the Act is unconstitutional because it confers such jurisdiction; on the contrary, the Circuit Court, in conformity with the controlling pronouncements of this court, has construed the Act as not conferring the jurisdiction asserted by the petitioner, thus avoiding any necessity of calling its validity into question under the Constitution.

Harriman v. I. C. C. (1908), 211 U. S. 407, 422;
Ann Arbor Ry. Co. v. U. S., supra (281 U. S., at p. 669).

(a) The Commission in awarding reparation exercises quasi-judicial power, as an agency of the judicial arm, and not of the Congress. In so doing, it is bound by its prior legislative determinations and must act with reference only to the law and the facts as they existed at the time the asserted right to damages arose.

As already pointed out, the Commission, which is simply an agency of the federal government, created by the Act and charged with the administration of a particular field of statute law, exercises dual functions. When it prescribes a rate for the future it acts in a legislative capacity, as the delegated agent of the legislative arm; but in awarding reparation (damages) arising out of asserted violations of law in the past, it acts solely as an agency of the judicial arm. This

viewpoint is not disputed by our opponents, who in fact have insisted, throughout this case, that the Commission's order for the payment of reparation upon which petitioner's suits depend was made by the Commission in an attempt to exercise its purely judicial functions and not in the exercise of its administrative or quasi-legislative power. In:

Baer Bros. v. D. & R. G. R. Co. (1914), 233 U. S. 479 (already cited),

this court said (at p. 486):

> "But awarding reparation for the past and fixing rates for the future involves a determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity to prevent future injury to the public."

In:

Great Northern R. Co. v. Merchants' Elevator Co., 259 U. S. 285 (already cited),

this court said further (at p. 291):

> "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function."

That the Commission is acting merely as an arm of the judiciary (i. e., as an agency of the court to estab-

lish merely a rebuttable presumption as to the facts) is forcefully demonstrated by this court's opinion in:

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412,

in which it was said (at p. 430):

> "It is also urged, as it was in the courts below, that the provision in Section 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents."

Acting in its judicial capacity, the Commission can take no action greater or different than that which a court itself might take under similar circumstances. Particularly, it must be bound by the law and the facts as they existed at the time the asserted cause of action arose.

Prentis v. A. C. L. R. Co., 211 U. S. 210 (already cited).

Furthermore, no court, undertaking to review a legislative determination by the Commission, could substitute its own judgment for that of the Commission,

and undertake to declare unreasonable that which the Commission by a valid prior legislative order had determined to be reasonable. A court under such circumstances could go no further than to determine whether the order of the Commission was validly made, within its statutory and constitutional powers, and predicated upon proper evidence; and if invalid, to enjoin the further operation of the Commission's order. Compare:

U. S. v. New River Co., supra;
I. C. C. v. U. P. R. Co., supra; and other cases cited in our argument under subdivision I (d).

The Commission, acting purely as a judicial agency (and our opponents insist that its action to award reparation here has been undertaken in the exercise of that function only) is subject to the same limitations as those which govern the action of a duly constituted court.

In other words, under our Constitutional system there is but one forum for the determination of a controversy as to private damages and that is a court, and (in the case of reparation under the Interstate Commerce Act), the Commission, acting as an agent of the court. Under the theory of petitioner, the Commission and the court would, in a controversy involving private damages, exercise a power which admittedly the court would not have in the case of an action to annul an order of the Commission for the

future; that is, the power to question the justness and reasonableness of an act of the Commission performed in its quasi-legislative capacity.

(b) The due-process clause of the Fifth Amendment prohibits any action on the part of the Commission, the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Commission's own prior valid legislative pronouncement.

While our opponents insist that the Commission's attempt to award reparation against the rates established pursuant to its prior legislative order was an exercise of purely judicial functions, we anticipate that it may nevertheless be asserted that in making the findings upon which the reparation order was based, it was acting in an administrative or quasi-legislative capacity. That argument is not tenable, as is shown at once upon reference to the *Baer Bros., Meeker* and *Great Northern Cases,* supra. But even if it were sound, it amounts simply to a contention that the Commission may make a retroactive legislative determination, modifying a prior valid and conclusive pronouncement; and may, upon such determination, divest property rights which have lawfully vested, pursuant to its prior order.

The Commission's findings and order in the *First Case* were promptly and literally accepted and obeyed by the carriers, who established and maintained their rates in conformity therewith. The petitioner and other shippers likewise accepted the order as valid,

and made their shipments and paid the charges thereon, according to the rates established pursuant to the decision. The carriers thus sold their transportation services at prices established in conformity with the legislative pronouncement issued by the Commission as the congressional agency, and collected charges determined to be reasonable, in fact and law, by the only body authorized to do so. When the transportation services were completed, the charges thus collected passed into the possession and ownership of the carriers and became their vested property. They could not thereafter be lawfully deprived of that property, even though the rate upon which the charges were predicated might lawfully be changed for the future, by the same agency which prescribed it in the first place. Neither the Commission, nor any other agency of the federal government subject to the prohibitions of the Fifth Amendment, could undertake by retrospective action to deprive the carriers of their vested property, acquired in strict conformity with the law in effect at the date the transactions were performed and completed.

The nature of the due process which the Fifth Amendment enjoins upon the governmental agencies has been considered in a vast number of decisions, and it will suffice here to quote briefly from a few of the leading pronouncements of this court. The decisions show that this court has consistently held that any action, by any agency of the federal government, whether styled administrative, legislative, or quasi-

judicial, is a denial of due process if it is not conformable with the fundamental principles of natural justice and of our system of government and of jurisprudence. Particularly, the decisions establish that a retroactive enactment by a legislature or legislative agency, undertaking to divest property rights which have been lawfully acquired in accordance with a prior act of the same legislature in effect at the date of the vesting, is wholly forbidden by the due-process clause, and invalid and of no effect whatsoever. In:

Fletcher v. Peck (1810), 6 Cranch (10 U. S.) 87; 3 L. ed. 162,

this court said (at p. 135):

> "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that the legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. *But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.*" (Emphasis supplied.)

In:

Forbes Pioneer Boat Line v. Board of Commissioners (1922), 258 U. S. 338,

this court held that the existing right of a vessel owner to recover back toll unlawfully collected from him for

passing through the lock of a canal cannot, consistently with the federal Constitution, be taken away by a state statute thereafter enacted, purporting to validate such collection. The federal inhibition referred to by the court was, of course, the prohibition upon acts of a state which take property without due process of law, set forth in the Fourteenth Amendment; but the same principle applies to acts of a federal agency, subject to the prohibitions of the Fifth Amendment.

In:

Blodgett v. Holden (1927), 275 U. S. 142, 72 L. ed. 206;

it was held that the Revenue Act of 1924, by which a tax was levied upon gifts *inter vivos,* could not, in view of the prohibitions of the Fifth Amendment, be construed as imposing a tax upon a gift fully completed and consummated prior to June 2, 1924, the date upon which the statute was approved. The conclusion was as follows:

> "So far as the Revenue Act of 1924 undertakes to impose a tax because of gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment."

The decision in the *Blodgett Case* was approved and applied to a similar transaction, by this court's decision:

Untermyer v. Anderson (1928), 276 U. S. 440.

Other leading decisions of this court in which the due-process clause has been considered, and the nature of the prohibitions laid upon government agencies has been defined, include:

Calder v. Bull (1798), 3 Dallas (3 U. S.) 385 (at pp. 388, 391);

Murray's Lessee v. Land Company (1856), 18 How. (59 U. S.) 272 (at pp. 276, 277);

Hurtado v. Calif. (1884), 110 U. S. 516 (at pp. 535, 536);

Twining v. New Jersey (1908), 211 U. S. 78 (at pp. 101, 102).

The Commission, as the agency of Congress, can have no greater authority than the Congress itself. The Fifth Amendment is held by this court to prohibit the Congress from attaching a retroactive liability, by way of tax, to a transaction which was consummated and completed in accordance with contemporary law. The congressional agency is therefore equally prohibited from taking any retrospective action, the effect of which would be to penalize transactions which were completed in accordance with the established law of the time, and from taking from the respondent carriers, by means of retroactive collateral orders awarding reparation, property which they have justly and lawfully acquired through their observance of the continuing valid findings and orders of the Commission itself. Certainly if direct retroactive action by Congress is forbidden in the premises, it cannot

successfully be argued that Congress could evade the prohibition, and accomplish indirectly that which is directly forbidden, by creating an administrative body clothed with powers which it could not itself exercise.

Petitioner refers (Brief, p. 17) to Section 15(2) of the Act and apparently intends to assert that that portion of the statute confers upon the Commission power to make a *retroactive order*, setting aside an order previously entered. The language of the statute does not support the construction urged by petitioner. Moreover, to interpret the statute as conferring such retroactive power would raise grave doubt as to its constitutionality, and would also conflict with the generally recognized principle that statutes, unless expressly made retroactive in operation, should be construed prospectively.

It will be observed that Section 15(2) expressly provides that all orders of the Commission (except for the payment of money) shall continue in force until further order, unless suspended, modified or set aside. The obvious intent of the section is to give continuing effect to an order, from and after its effective date, and until the Commission issues a further order, in a collateral proceeding, or a supplemental order in the same proceeding, suspending, modifying or setting aside the prior order. There is certainly no express language in the statute which indicates that any modification or setting aside by the Commission may be retroactive; and there is equally no implication, either

in the section itself or elsewhere in the Act, that a valid legislative order of the Commission may be set aside retrospectively. Section 15, including the paragraph referred to, embodies those provisions of the Act which, generally speaking, confer upon the Commission its legislative power to prescribe rates, practices, etc., to be followed by carriers subject to the Act. Orders made pursuant to the provisions of Section 15 (which, it may be added, does not include any provision authorizing the awarding of reparation) are, practically without exception, administrative or legislative in character; and such would be the character of an order undertaking to set aside a prior legislative order. To give to the statute the interpretation contended for by petitioner would be to construe it as operating retrospectively. The retrospective construction of statutes has always been looked upon with disfavor. It is a maxim as ancient as the law itself that a new law ought to be prospective, and not retrospective, in its operation. We quote the following summary of the principles embodied in the decisions of this court and other recognized authorities (25 *Ruling Case Law*, pp. 787, 788):

> "Even though the legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that stat-

utes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common law right, or the effect of giving it retroactive operation will be to destroy a vested right or to render the statute unconstitutional."

Furthermore, as we have shown in our preceding discussion, if the Commission, in making a retrospective order undertaking to set aside a prior legislative order, should also attempt to deprive any party of property rights which had vested and become complete during the period of approved operation of the order, it would to that extent be acting in defiance of the limitations of the due process clause; and if the statute were so construed as to authorize that action, it would itself be unconstitutional to that extent, because in violation of the Fifth Amendment. Any doubt as to the constitutionality of the statute in this respect can best be resolved by construing it as prospective in operation only, and that construction should therefore be followed. The section should not be interpreted as authorizing the Commission to annul or set

aside a prior valid legislative order, except as to its prospective operation.

Our opponents seek to avoid the force of our argument by stating (Petitioner's Brief, p. 29) that we depend upon some asserted vested right in the *continuance of the rate* fixed in the *First Case.* They cite various decisions, including:

Skinner & Eddy Corp. v. U. S. (1919), 249 U. S. 557.

In that decision this court held that there is no vested right in the *continuance of a particular rate or rate-fixing order* of the Commission. It may be conceded that the decisions cited by our opponents state a correct principle; but they are obviously inapposite. We do not assert any such vested right as our opponents affect to believe. We do contend that the order in the *First Case,* issued in the exercise of the Commission's legislative power, determined as a matter of law and for the period during which it continued effective, the reasonable maximum rate which the carriers could charge. That determination was, of course, subject to prospective change by the Commission. The decisions referred to by our opponents simply establish the principle that a legislative order of the Commission is not to be regarded as final and conclusive for all time, and immune to prospective change: a point which is not here involved, and need not be discussed. Our contention is simply that while such change may be prospective, it cannot, under any

theory of law reconcilable with the due-process clause, be made retroactive so as to take from the carriers property which they have acquired in their observance of, and obedience to, the Commission's determination and formal continuing order.

IV.

FURTHER REPLY TO ARGUMENTS ADVANCED BY PETITIONER AND OTHERS SUPPORTING PETITIONER'S CONTENTIONS.

(a) Affirmance of the Circuit Court's decision will neither amend the Act by implication, nor deprive the Commission of any power or authority essential to its regulatory functions.

We have already noted our opponents' contention that affirmance of the decision here under review will be equivalent to a judicial amendment of the Interstate Commerce Act, and will deprive the Commission of an essential portion of the jurisdiction which it now exercises under that statute. It is said that this amendment can arise only by implication, for it does not rest upon any express provision or limitation found in the Act.

Our opponents' contention is quite erroneous; for, as we have shown, the decision of the lower court does not depend upon any implied limitation, but upon the express provisions of the Act, which authorize the Commission to award reparation only when a violation of the Act has been committed by a carrier, as a result of which a shipper has suffered pecuniary damage.

Our opponents are also in error in their assumption that the power to award reparation against Commission-made rates is an essential and indispensable part of the Commission's general regulatory power. It has repeatedly been held that the power to award reparation has no place in a system of regulation which contemplates that the rates charged shall become and continue effective only in response to the direct prior approval of the regulatory body. This doctrine is exemplified by the decisions of the highest courts of Texas, Louisiana, Mississippi, Alabama and Virginia, and of the Federal District Court for Arizona, already noted. See also, *Scott, Magner & Miller v. W. P. Ry. Co.* (1913), 2 Ops. R. R. Comm. of Calif. 626, 636-637.

Moreover, the Commission has itself recognized, in several of its recent annual reports to Congress, that its reparation power is not only not essential to its general powers of regulation, but is in fact, particularly as at present exercised, the source of embarrassment, congestion and grave abuse. In its report for the year 1916 it urged Congress to relieve it at least in part, of its reparation power, and referred at length (Annual Report for 1916, pp. 75-78) to the flood of complaints for reparation then upon its docket, which required individual attention, and prevented proper consideration of more important cases involving rates for the future. It said, in particular:

"Whenever it is thought that there is any prospect of securing an award of reparation,

complaint is brought before the Commission, which necessitates hearing, decision and preparation and printing of a report. The number of such cases is very large, and it is undoubtedly true that if it were not for the hope of securing reparation a majority of the complaints filed would not be presented. * * * *If we had no power to award reparation a mass of cases which now require consideration and decision, with all their attendant detail work and expense, would be kept off the Commission's dockets.* * * *The adoption of such a plan as this would make it possible to apply the energies expended upon rate controversies in the direction of constructive work for the future* instead of expending them upon controversies as to reparation for the past, with every probability that in a majority of the cases the one who ultimately bore the charge will never be reached by the reparation." (Emphasis supplied.)

In its annual report for 1919 the Commission referred to the 1916 report and renewed its recommendation that the power to award reparation should be materially restricted, if not abrogated entirely (Annual Report for 1919, pp. 17-21, 53). In the annual report for 1920 (at p. 78) the Commission referred to its prior annual reports, and again renewed its recommendation to Congress that its power to award reparation should be substantially limited, or transferred wholly to the courts, subject to the necessity of preliminary findings by the Commission as a prerequisite to court action. In the Annual Report for

1921 (at p. 58) the Commission renewed the recommendation made in the 1919 and 1920 reports, in substantially the same language.

In its latest annual report (1930), the Commission (at pp. 90-93) has again discussed its power and duty under the Act with respect to reparation, and has again renewed the recommendations made in the earlier reports above referred to. It has said in particular:

> "The increased number and complexity of these so-called reparation cases have so encroached upon our time and energies as to deprive us of adequate time for the thorough consideration of the many larger and more important problems continually coming before us."

After referring to what was said in the 1916 report (and quoting a portion of its language therein), the 1930 report continues:

> "The practices to which we there referred have not diminished but have greatly increased. These and many other questionable practices are often resorted to.
>
> Another growing class of complaints is found in those involving the applicability of the rates filed pursuant to section 6 of the act, wherein a refund of alleged overcharges is sought. These cases are extremely technical in character, and although many prove to be without substantial merit, all require consideration.

The burden of reparation cases has become heavy and some measure of relief is required in the public interest.

When the interstate commerce act was passed, we were given no power to prescribe rates for the future such as we now have under the amendments of 1906, and it was therefore entirely reasonable that parties who could not secure in advance reasonable rates for prospective shipments should have a considerable length of time after their shipments moved and the unreasonable charges had been paid within which to file complaints for reparation.

At present the cause of action accrues upon delivery or tender of delivery of the property by the carrier and, with certain exceptions, complaints must be filed within two years thereafter, except for overcharges, for which the period is three years. But now that we have been granted quasi-legislative power to prescribe just and reasonable rates for the future, and the rate structure of the country is so largely that which has come out of many formal proceedings before us, over a long period of years, we are of the opinion that these statutory periods should be substantially reduced."

These expressions of the Commission show that it not only agrees with the courts that the reparation power is not an essential and indispensable adjunct of the general power of regulation,[1] but also regards

(1) *Cf. Anadarko Cotton Oil Co. v. A. T. & S. F. R. Co.* (1910), 20 I. C. C. 43, 50.

its exercise as offering a serious and unnecessary handicap to the discharge of the constructive duties which the Act places upon it.

The Commission's general criticism applies with especial force to the asserted power to award reparation against rates which the Commission has itself prescribed or approved. Indeed, the language from the 1930 report, last above quoted, indicates that the Commission agrees, in principle at least, that even if that power now exists, it should be restricted by statute, because of the obvious injustice to the carriers inherent therein; and further, because it is largely, if not entirely, unnecessary under the present system of rate-regulation created by the Act.

The Arizona Corporation Commission, in its brief herein as Amicus Curiae (at pp. 9-13) refers to the general investigation of the national rate structure (I. C. C. Docket No. 17000) undertaken by the Interstate Commerce Commission in response to the Hoch-Smith Resolution (43 Stats. L. 801). It is said that when that investigation has been completed many, if not most, of the rates applying to interstate commerce will have been established pursuant to affirmative continuing rate-fixing orders of the Interstate Commission. The argument is advanced that if the principle followed by the Circuit Court herein is sound, the Commission's jurisdiction to award reparation will be completely ousted. Somewhat similar contentions are advanced in the brief for the Association of Rail-

way, etc., Commissioners, also appearing as Amicus Curiae.

This contention is quite inconsistent, to say the least, with the position taken by the Interstate Commerce Commission in its latest (1930) annual report to Congress, as indicated by the language quoted above. Moreover, it presents no valid reasons for condemning the sound legal principles upon which the Circuit Court's decision is based. Although it is asserted that in the general investigation it is impossible for the Commission to determine reasonable individual rates, that is precisely what the Commission has undertaken to do in every decision thus far rendered therein. It has prescribed individual rates, and revised individual rules and practices, and it has emphasized, e. g., in the *Grain Case* (164 I. C. C. 619, 661) and in the *Livestock Case* (176 I. C. C. 1, 83), that its findings have been rendered under appropriate provisions of the Act and that the rates prescribed are "reasonable rates". It has issued affirmative orders requiring the carriers to readjust their individual rates to conform to those prescribed or found reasonable. Those findings are by law conclusive if jurisdictionally made; compliance therewith cannot be avoided except under pain of severe penalty. The carriers by accepting and obeying those orders fulfill their duty under the law, as interpreted for them by the only tribunal having final authority. The result may be—doubtless will be—that as to a large

body of traffic moving under the rates prescribed, no reparation power will exist; but that result follows from the carriers' obedience to the law and to the Commission's orders, and from the affirmative provisions of the Act which provide that reparation may be awarded only for a violation thereof.

Our opponents' assertion that the Circuit Court's decision, if affirmed, will deprive the Commission of existing jurisdiction over a vast body of interstate traffic is therefore quite erroneous. The Commission will lose no jurisdiction now possessed under the statute; it will still retain the power, which it has always had, to award reparation for violations of law; and it will still be unable, as it always has been, to penalize a carrier's compliance with and obedience to the law which it administers and to its own affirmative and binding orders thereunder. In short, affirmance of the Circuit Court's decision will simply give recognition to the principle that in a regulatory system which contemplates that a governmental tribunal shall fix the lawful rates to be charged by common carriers, there is no room for the theory that private damages may be caused by the assessment of the rates so fixed.

As a matter of fact the exercise of power to award reparation against Commission-made or approved rates would not only fail to promote the essential purposes of the Act, but would work precisely opposite results. One of the primary ends intended to be served by the Act is to secure uniformity and stability

of transportation charges. If the Act were construed as authorizing the Commission to repudiate its own formal decisions in collateral proceedings, and to penalize carriers for having in good faith complied with its formal findings and orders, then that purpose, instead of being promoted, would be completely defeated. No rate, even though fixed by the Commission, could be relied upon as stable, even for a day; neither shipper nor carrier could be certain that a transaction, though carrying the contemporaneous sanction of the Commission, would not thereafter be repeatedly disturbed and readjusted by means of collateral retroactive orders. The fundamental purpose of the Act would be completely overthrown, and confusion rather than stability and certainty would inevitably follow.

(b) The retrospective findings in the Third Case cannot be relied upon as establishing the unreasonableness of the rates charged, for the question whether those findings are valid constitutes the fundamental issue.

Throughout its brief petitioner asserts, as one of the basic propositions upon which its argument rests, that the rates charged upon its shipments were unreasonable "in fact", and argues (Brief, p. 48) that the Commission's finding in the *Third Case* conclusively shows that those rates were unreasonable as alleged. Indeed, this finding constitutes the only basis for the petitioner's repeated assertion of "factual" unreasonableness.

It is also asserted that the respondents have submitted no evidence to show the contrary, and that their only contention has been that the rates were conclusively just and reasonable, not *in fact*, but because of the Commission's prior decision in the *First Case*, which was still in effect without modification at the time the shipments moved.

It must be obvious that the petitioner, in ascribing conclusive effect to the findings made in the *Third Case*, is simply arguing in a circle. The essential question here before the court is whether those findings of unreasonableness, as to the past, were jurisdictionally made and therefore valid. The assertion that they are conclusive simply begs the question, for it assumes that the Commission has acted within its jurisdiction, as to the precise matter with respect to which its jurisdiction is challenged.

Petitioner is also incorrect in asserting that no evidence tending to show that the rates charged were not unjust and unreasonable "in fact" has been submitted by respondents. The rates were in conformity with the Commission's valid findings and continuing valid order in the *First Case*. Both the decision and order in the *First Case*, and the carrier's action in establishing their rates conforming thereto during the continued life of the order, are set forth in the agreed statement of facts (R. 256-258, 263-275). Moreover, if the Commission's findings are to be given conclusive effect, as petitioner contends, those made in the

First Case must be treated as final and binding, for their constitutional and statutory validity has never been questioned, is not now before the court, and must therefore be accepted as established.

(c) The shipper's supposed property right to be charged no more than a just and reasonable rate is fully safeguarded by the charging of a rate conforming to a valid and continuing determination by the Commission.

At pages 18 to 20, and again at page 31, of petitioner's brief, reference is made to decisions which indicate that carriers are entitled only to just and reasonable rates and reasonable compensation for their services; that a shipper has equally a right to be charged no more than a reasonable rate. From these premises it is argued that if a shipper cannot obtain reparation in a proceeding before the Commission, because of a prior investigation and order of the Commission prescribing the rate to be charged, he will be deprived of his property right, without due process of law, if *in fact*[1] the rate charged upon his

(1) *Anadarko Cotton Oil Co. v. A. T. & S. F. Ry. Co.*, supra (20 I. C. C., at pp. 49-50):

"The standard of the law by which the validity of any rate as affected by its amount is determined, is not more definite than that it must be reasonable and just. The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. In the nature of the case there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration.

The law imposes upon the carriers the duty of initiating their rates, under the injunction of the statute that they shall be reasonable and just. In the performance of this duty by the car-

shipments was unreasonable, even though in conformity with findings and orders of the Commission in effect at the time his shipments moved. The very statement of this argument exposes its utter fallacy. It assumes that a rate which is maintained in conformity with a conclusive and valid determination of the Commission contemporaneously in effect can, in legal contemplation, be other than just, reasonable and lawful. In our preceding discussion we have shown that, from the legal standpoint, a rate which conforms to such a valid decision of the Commission is thereby conclusively established as just, reasonable, and otherwise lawful, in all respects.

Petitioner's argument likewise assumes that the rate which was charged upon its shipments here involved is shown to have been unreasonable in fact: an assumption which is predicated wholly upon the findings, and the resulting reparation order, in the *Third Case,* and can be justified only if those findings and

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riers they must exercise judgment and discretion by a like resort to existing facts, circumstances, and conditions in the first instance, just as the Commission must later do when the rates are brought in question before it. The carriers are presumed to act in good faith in their exercise of discretion and its practical application, and therefore rates established by the carriers can not be condemned except upon investigation and full hearing. A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable." * * *

"Therefore the awarding of reparation by no means necessarily follows the reduction of a rate, whether by the voluntary action of the carriers or by order of the Commission."

that order are valid. But the question of their validity is the essential issue here before the court; and therefore to assume their validity, as the basis for further argument, simply begs the question.

(d) The opinion of the Circuit Court recognizes that a carrier's compliance with an affirmative order prescribing a reasonable maximum future rate fulfils the obligation under the Act to maintain and charge just and reasonable rates.

At page 22 of its brief, in the course of an attempt to analyze the opinion of the Circuit Court of Appeals in the case at bar, petitioner asserts that that opinion recognizes that the carriers, although complying with a so-called "maximum rate order" of the Commission, were still under a duty to fix and charge a just and reasonable rate, and were not relieved of that duty by compliance with the "maximum rate order". In its analysis, petitioner has overlooked various portions of the opinion which show that the court in fact reached conclusions directly opposed to petitioner's inferences. For example, the Circuit Court said (R. 446):

> "We are in accord with the apparent conclusion of the Commission that its order fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established, and that the order of the Commis-

sion amounted to a decision that rates fixed by the carrier below the maximum it had established were just and reasonable."

(R. 450):

> "In view of the history of the legislation and its cardinal purpose, it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate. * * * In numerous decisions by the courts considering the question of freight rates * * * the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable."

In other words, the court recognized that a maximum rate fixed by the Commission must necessarily be lawful: i. e., inherently just and reasonable; and that the carriers, in complying with the Commission's rate-fixing order, discharged the obligation imposed by the Act to maintain and apply just and reasonable charges.

(c) Petitioner's review of the course of the proceedings before the Commission is erroneous in certain particulars.

At pages 23 and 24 of its brief, petitioner illustrates its argument by referring to the course of the litigation in the *Second* and *Third Cases*. It points out that the rate published in compliance with the order in the *First Case* became effective on September 17, 1921 (which is correct), and that on November 3, 1922, certain shippers at Phoenix filed a complaint with the Commission attacking the rates then in effect.

That statement is likewise correct. However, petitioner is in error in its further assertion that decision upon this complaint was not made until March 12th, 1928, and that during all the period from November 3, 1922, until March 12, 1928, the petitioner and other Phoenix shippers were compelled to pay the challenged rates. The Commission's decision in the *Second Case* was rendered in January, 1925, and an order prescribing reduced rates for the future was issued. The reduced rate (71 cents) became effective February 25, 1925. *While the Second Case was subsequently reopened, the order prescribing future rates therein was not vacated; and the 71-cent rate continued in effect until 1928, when the decision in the Third Case was rendered.* In that decision the Commission found that the 71-cent rate which it had previously prescribed was, as applied to shipments from northern California to Phoenix, less than a reasonable maximum rate, and that 73 cents would have been just and reasonable. In short, there was no such excessive delay in the disposition of the proceedings as petitioner's erroneous statement implies; on the contrary, petitioner, and other shippers, obtained for three years the benefit of a rate materially lower than that which the Commission subsequently determined would have been proper. They have retained that advantage, for of course the carriers are powerless, under the law, to recover the difference (over $12.00 per car) between their lawfully published rate and the higher basis subsequently found reasonable by the Commis-

sion. That sum was irretrievably lost to the carriers because of the Commission's error of judgment.

(f) A valid legislative determination made by the Commission is conclusive in a subsequent judicial proceeding, either in court or before the Commission.

At pages 25 and 26 of petitioner's brief, it is said that the Commission, acting in a *judicial* capacity, has a right to determine, in view of facts then before it, whether a rate attacked for purposes of reparation was "in fact" just and reasonable; and that the fact that the Commission, acting *legislatively*, has previously prescribed that rate or a higher rate cannot be conclusive in a judicial proceeding. It is also said that it is the duty of the Commission, acting in its judicial capacity, to determine whether under the particular facts and circumstances before it, the rate as applied was just and reasonable.

We challenge directly petitioner's assertion that a rate previously prescribed by the Commission, in its legislative capacity, is not conclusive in a judicial proceeding. The decisions of this court, without exception, sustain the proposition that a valid order of the Commission prescribing the reasonable level of a rate for the future is conclusive upon review by the courts, provided only that the Commission has acted within its jurisdiction and upon adequate evidence. Its determination has the force and effect of a statute, for it is made by the Commis-

sion as the delegated agent of Congress. Petitioner concedes (Brief, p. 26), as perforce it must, that a court or a judicial body is bound, in any action it may take, by the law in effect at the time the asserted cause of action arose. It follows that the Commission, acting judicially to award reparation, must be bound by the statutory determination which was outstanding and unmodified at the time the shipments moved; and that as long as it acts as a court, it cannot modify that determination or proceed upon any other basis. Of course, if it undertakes, in its administrative capacity, to make a retroactive modification of a prior legislative act, its action, to the extent that it would deprive carriers of property lawfully vested, is forbidden by the due-process clause.

(g) The decision in the Baltimore and Ohio Case (279 U. S. 781), does not sustain petitioner's contention.

At pages 27 and 28 of its brief, petitioner refers to this court's decision in:

> *Baltimore & Ohio R. R. Co. v. U. S.* (1929), 279 U. S. 781.

In that case this court held that when an order of the Commission purporting to adjust divisions of joint rates as between carriers was set aside as invalid, the court could, as part of the relief granted, order a restoration of funds paid under the erroneous order. The decision obviously has no application to the instant case. The Commission, in the *Third Case* was not

undertaking, as a court of review, to decide whether the legislative order in the *First Case* was erroneous or invalid. It made no finding to that effect. Indeed, the findings and order in the *First Case* have never been alleged to be erroneous, invalid, or illegal. On the contrary, they were accepted by all parties, carriers and shippers alike, became effective in due course, were faithfully complied with, and continued in effect without modification until superseded on February 25, 1925, by the order prescribing future rates made in the *Second Case*. The principle of the *Baltimore & Ohio Case* applies only to decisions of the Commission which are set aside as invalid, *in a direct court proceeding*, in which their validity is challenged. It could not possibly apply in the case at bar, where there has been no direct, but at best only a collateral inquiry, and the *validity* of the prior order has never been called into question.

(h) Affirmance of the Circuit Court's decision will impose upon the Commission no greater duty of supervision over the rate-structure than is now placed upon it by law.

At page 39 of its brief, petitioner argues that a rate, though once prescribed, does not necessarily remain for all times just and reasonable; and review and approval by the Commission do not guarantee that the rate will be just and reasonable at all times thereafter, or until the Commission orders a change. It is also said (Petitioner's Brief, p. 41) that if the Circuit Court's decision is sustained, it will be neces-

sary for the Commission to exercise constant supervision of all rates, and that an impossible task will thus be imposed upon the Commission.

We may concede the abstract principle that a rate once established does not remain forever just and reasonable. However, it must be remembered that affirmative orders of the Commission prescribing rates which the carriers must observe are, by the very terms of the statute, continuously in effect until thereafter changed, unless the order itself embodies some inherent limitation. Practically without exception, orders of the Commission fixing rates for the future are given continuing effect, subject of course to the Commission's power to vacate or modify them prospectively. No matter what change of conditions may take place, carriers cannot revise a rate upward, once it has been prescribed, without prior approval. Since their *discretion* to advance rates is thus taken away, equally their *obligation* to revise them downward must be regarded as suspended. On the one hand, they must observe the limitations enforced by the Commission's superior judgment; therefore they should, on the other, be permitted to rely upon that judgment as the measure of their duty.

Nor is it correct to say that affirmance of the Circuit Court's decision would require of the Commission any task not now imposed upon it by law. It is now its duty to exercise constant supervision over all interstate rates of railway common carriers. Under Section 12 (1) of the Act the Commission is authorized *and required* to execute and enforce the provisions of

the Act. Under Section 13 (1, 2) the Commission is required to investigate rates and practices of common carriers, either upon complaint of interested parties or *upon its own motion.* Under Section 15(7) the Commission is empowered, either upon complaint or *upon its own initiative* to suspend and investigate the lawfulness of any schedule filed with it, stating any new rate, fare, or charge, or any new regulation or practice affecting such rate, fare, or charge. Under Section 15-a(2) the Commission is required, in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, establish or adjust such rates to the end that carriers as a whole or by groups will earn aggregate annual net railway operating income equal to a fair return upon their carrier property. Finally, by the so-called "Hoch-Smith Resolution" (January 30, 1925; 43 Stat. L. 801) the Commission was expressly directed to make a thorough investigation of the rate-structure of carriers subject to the Act in order to correct any illegalities and defects which might be found to exist. We are here referring only to the more outstanding provisions of the Act which impose an affirmative and continuing duty of supervision upon the Commission. The Hoch-Smith Resolution does not, of course, direct the Commission to continue its investigation indefinitely; but it does require that the investigation be thorough; and it is a matter of common knowledge that it is still in progress at present, and apparently far from concluded.

At pages 46 and 47 petitioner asserts that it is admitted that the Act does not specifically restrict the

Commission from allowing reparation when it finds a rate unreasonable, because such rate is equal to or less than a previously approved maximum rate—in the opinion of the Circuit Court such restriction is placed upon the Commission only by implication. While we have already discussed this contention at some length it is desirable to review it again briefly.

The opinion of the Circuit Court does not admit of the interpretation asserted by our opponents; on the contrary, it agrees with our contention that the Act, by express provision, specifically and directly forbids the Commission to award reparation under such circumstances. The Act permits the Commission to exercise its reparation power, *only* when there has been a violation of the Act, by a carrier subject to its provisions. The Circuit Court properly holds that a carrier's publication and assessment of a rate conforming to a binding and valid determination, by the Commission, of the reasonable maximum rate to be charged for the service, is not a violation of the statute; that hence there is no basis for an award of reparation under the Act; and that in attempting to make such an award, the Commission has acted in excess of its statutory powers, and its attempted order is therefore void.

Conclusion.

Our discussion has perhaps extended to undue length, and our apologies are therefore tendered to the Court. We feel, however, that the issue is of our

standing importance, and that full discussion is necessary; moreover, we are undertaking to reply to the arguments not of one, but of several, opponents.

The petitioner's argument, throughout its brief, depends upon two essentially erroneous premises: *first*, that the rates charged upon its shipments were unreasonable *in fact*, at the time of their assessment; and *second*, that the Commission in the *First Case* prescribed a maximum rate which was not also inherently just, reasonable and otherwise lawful. As to the first assumption, there is absolutely no proof of unreasonableness, except that afforded by the Commission's retroactive finding in the *Third Case*, and the subsequent reparation order. Both that finding and order are void because they were not made by the Commission in pursuance of jurisdiction conferred upon it by the Interstate Commerce Act and permitted to it by the Fifth Amendment. Moreover, to assume that the finding and order afford a valid basis upon which the argument may be predicated is to assume that they were jurisdictionally made, and thus to assume in advance a favorable answer to the very issue which is before this court for decision. It must be apparent that in this respect petitioner's argument simply begs the question.

As to petitioner's second fundamental premise, we submit that the rate prescribed in the *First Case* could not have been other than just, reasonable and lawful; that this conclusion is supported by the overwhelming weight of the authorities, for indeed no opposing authority is referred to by our opponents.

It may be observed in fact that the petitioner is alone in making the contention that the rate prescribed in the *First Case* was other than just and reasonable; neither the Interstate Commerce Commission, nor the others who appear herein as Amici Curiae agree with or support its contention. Since petitioner's argument is based upon these fundamental erroneous premises its entire argument necessarily fails.

The respondents believe that the decision of the Circuit Court is correct in every essential particular and should be affirmed. The Circuit Court has recognized the controlling principles established by statute and by the decisions of this court, and has in effect reached conclusions as follows:

(1) The Commission, when it makes a valid decision and order in its legislative capacity, prescribing or approving the reasonable maximum rate thereafter to be charged, thereby conclusively determines, for the period of approved operation of its decision and order, the measure of a just and reasonable rate in the premises, since it is the only body which has final administrative power to decide what is a just and reasonable rate.

(2) A carrier's compliance with and obedience to such a decision and order, throughout its effective period, completely discharges the duty imposed by the Act to maintain and charge just and reasonable rates, since the carrier in effect adopts and follows the conclusive and binding determination of the only tribunal which has final authority in the premises.

(3) The Act confers power upon the Commission to award damages only when a violation of the Act is proven, as a result of which a shipper has suffered pecuniary loss. Since the charging by a carrier of a rate equal to or less than that fixed by the Commission as a reasonable maximum cannot by its very terms be a violation of the Act, the Commission has no power, under the statute, to award *reparation* in such circumstances.

(4) If the Act were so construed as to permit the Commission to determine, retroactively, that a rate which it had previously fixed as reasonable was unreasonable during the period of approved operation of its earlier decision, and to award damages for a carrier's compliance with the earlier decision, it would to that extent be unconstitutional, in violation of the due-process clause of the Fifth Amendment.

The Circuit Court has not undertaken, by its decision, to amend the Act by implication or by judicial construction, nor has it invoked the Constitution in order to strike from the Act any provision which it has heretofore contained. The Circuit Court has simply applied the plain provisions of law which now limit the Commission's power to award reparation to those instances where it is shown that the statute has been violated, to the damage of a shipper. By their application it has construed the Act as forbidding the Commission to attempt, by such awards, to attach retroactive penalties to transactions which at the time of their inception and completion were in accordance with the outstanding valid continuing pronouncements

of the Commission, and carried its contemporaneou approval.

We ask the court to conclude that carriers are n to be penalized in damages for having obeyed vali findings and orders of the Commission; that when carrier complies with the law and the Commission conclusive determination, it cannot thereafter be de clared to have violated the law and compelled to re spond in damages for doing the very thing which th law authorized and required. The judgment of the Cir cuit Court, holding that the Commission was withou jurisdiction under the Act to make the reparatio order here in suit, and that such order is void and o no effect, should be affirmed with costs to the re spondents.

Respectfully submitted,

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Dated at San Francisco, California,
November 20, 1931.

(APPENDIX FOLLOWS.)

Appendix.

Section 1, paragraphs 4, 5 (49 U. S. C. 1, 4, 5; 34 Stat. 584, as reenacted in 1920, 41 Stat. 474);

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *Provided,* That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Gov-

ernment, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further,* That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

Section 8, (49 U. S. C. 8; 24 Stat. 382);

Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9, (49 U. S. C. 9; 24 Stat. 382);

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the

right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 12, paragraph 1 (49 U. S. C. 12, 1; 26 Stat. 743) in part:

Sec. 12 (1): * * * And the Commission is hereby authorized and required to execute and enforce the provisions of this Act; * * *.

Section 16, paragraph 1, (49 U. S. C. 16, 1; 41 Stat. 491);

Sec. 16. (1) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

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CHARLES ELMORE CROPLEY
CLERK

No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1931

ARIZONA GROCERY COMPANY, A CORPORATION, PETITIONER

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, ET AL., RESPONDENTS

AND

ARIZONA GROCERY COMPANY, A CORPORATION, PETITIONER

v.

SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO FILE BRIEF, AND BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

H. L. UNDERWOOD,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel.

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ARIZONA GROCERY COMPANY, A CORPORATION, petitioner

v.

SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL., respondents

APPLICATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Comes now the Interstate Commerce Commission, by its Chief Counsel, and respectfully requests leave of the Court to file a brief on behalf of the Commission in support of the petition for certiorari, heretofore filed herein. The interest of the Interstate Commerce Commission in having a final determination of the case and its suggestions as to some of the important considerations involved are set forth in the brief hereto attached.

DANIEL W. KNOWLTON,
Chief Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, A CORPORATION, petitioner

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SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL., respondents

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

Pursuant to leave of Court, the Interstate Commerce Commission, hereinafter referred to as the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Ninth Circuit, rendered March 23, 1931, which it is sought to review, is not yet reported. It reversed the judgments of the United States District

Court for the District of Arizona which sustained and enforced an order of reparation made by the Commission. (140 I. C. C. 171.)

The filing of this brief is prompted by the importance, in the view of the Commission, of securing a finally determinative adjudication of the questions presented in this case, as to the scope and extent of the power and authority of the Commission in respect of awarding reparation.

THE FACTS

By its decision of June 22, 1921, the Commission found unreasonable the rates of $1.045 per hundred pounds on sugar from California points to Phoenix, Ariz., and that for the future rates on that commodity would be unreasonable to the extent that they exceeded 96.5 cents. (*Phoenix Chamber of Commerce et al.* v. *Director General,* 62 I. C. C. 412.) An order entered pursuant to these findings required the defendant carriers to establish rates which should not exceed 96.5 cents per hundred pounds.

In compliance with that order the carriers established a rate of 96 cents. This was reduced to 86.5 cents, pursuant to the recommendation of the Commission in *Reduced Rates,* 1922, 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents, to conform to the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

In a decision dated January 6, 1925, the Commission again considered the rate on sugar between California and Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, prior to and subsequent to July 1, 1922. Those complainants who had made shipments were held entitled to reparation. (*Phoenix Chamber of Commerce et al* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*, 95 I. C. C. 244.) A rate of 71 cents was thereupon put into effect.

The orders involved in the instant case were made pursuant to the Commission's decision in *Traffic Bureau of Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe R. Co. et al.*, 140 I. C. C. 171, which awarded reparation on shipments made between February 25, 1923, and February 10, 1925. In that case the Commission held unreasonable, prior to July 1, 1922, rates in excess of 79 cents and 81 cents from southern California and northern California points, respectively, to Phoenix, and from July 1, 1922, and for the future, rates in excess of 71 and 73 cents, respectively.

The basis on which the decision of the Circuit Court of Appeals was predicated was that while in exercising its rate-making functions, the Commission is not bound by any doctrine of *res judicata*, since it is acting in its administrative or legislative capacity, yet in awarding reparation it acts in a judical capacity; that since it had in effect in 1921 prescribed as a reasonable or lawful rate a maxi-

mum rate not to exceed 96.5 cents, that rate was a Commission-made rate and, hence, could not be said to be unlawful until changed by it, and therefore, exaction of such rate prior to the change could not be said to be unlawful—a tort—constituting a basis for reparation.

The view of the Commission in this regard is thus stated in its report (140 I. C. C. 171, at p. 180):

> Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss v. Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must

follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

It has taken like action in other cases: *Eagle Cotton Oil Co.* v. *Southern Ry. Co. et al.*, 140 I. C. C. 131; *Arizona Corporation Commission* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 156 I. C. C. 418, 425, 426; *Brannon Coal Co.* v. *Southern Ry. Co.*, 157 I. C. C. 486, 487.

It is submitted that the fact that the Commission has once found that rates not in excess of a stated maximum will be reasonable for the future constitutes no warrant for the exaction of such rates for all time, or until the Commission revises its finding, when due to changed conditions those rates have become unreasonable.

There is an obligation upon the carrier under Section 1(5) of the Act to charge only such rates as are reasonable, and the fact that the Commission has taken no action to revise a rate once established as reasonable does not relieve the carrier of such obligation. It can not in reason be asserted that the Commission is under the necessity of constant supervision and readjustment of thousands of rates involving many carriers to the end that when once established, they be kept currently reasonable at all times. Surely Congress intended no such burden to be imposed, nor that shippers should be

prejudiced by the failure of the Commission to be at all times reviewing established rates to determine their present reasonableness.

This case presents considerations which have vital bearing upon the future course of action of the Commission in respect of reparation proceedings, and as to the extent of its power and duty therein, and it is of importance in the proper administration of the duties imposed upon it with respect to reparation proceedings that the power and authority of the Commission should be defined by this Court, in the respect that it is involved in this case.

Respectfully submitted.

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DANIEL W. KNOWLTON,
Chief Counsel.

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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1931

ARIZONA GROCERY COMPANY, PETITIONER

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

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Chief Counsel.

INDEX

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATEMENT	2–4
The Proceedings before the Commission	2–4
The Proceedings in Court	4
THE STATUTES	4–8
SUMMARY OF THE ARGUMENT	8–10
ARGUMENT	10–24
I. There is a continuing duty upon common carriers subject to the Interstate Commerce Act to exact only rates, fares, or charges which are reasonable. The fixing by the Commission of rates as reasonable does not absolve the carriers from that duty	10–18
II. The order of the Commission awarding reparation was predicated upon a finding made upon a comprehensive record which for the first time presented fully the question of the reasonableness of the rates involved. The action of the Commission was consistent with its action in other cases	19–21
III. It may well be urged that the rates involved were not "Commission-made"	22–24
CONCLUSION	24

TABLE OF CASES CITED

Page

Arizona Corporation Commission v. *Atchison, Topeka & Santa Fe Ry. Co.*, 156 I. C. C. 418 20
Arkansas Fuel Co. v. *C., M. & St. P. Ry. Co.*, 16 I. C. C. 95 15
Atchison, T. & S. F. Ry. Co. v. *U. S.*, 51 F. (2d) 510 12
Baer Bros. Mercantile Co. v. *D. & R. G. R. Co.*, 233 U. S. 479 ..... 9, 14, 15
Brahnon Coal Co. v. *Southern Ry. Co.*, 157 I. C. C. 486 20
Brimstone Railroad & Canal Co. v. *United States*, 276 U. S. 104 10
Davis v. *Portland Seed Co.*, 264 U. S. 403 15
Eagle Cotton Oil Co. v. *Southern Ry. Co.*, 140 I. C. C. 131 20
Eagle Cotton Oil Co. v. *Southern Ry. Co.*, 51 F. (2d) 443 ..... 10, 16, 22
I. C. C. v. *L. & N. R. R.*, 227 U. S. 88 11
Keough v. *C. & N. W. Ry. Co.*, 260 U. S. 156 15
Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U. S. 654 ..... 9, 11, 14, 20
Louisville & Nashville R. R. v. *Sloss-Sheffield Co.*, 269 U. S. 217 ..... 9, 14, 20
Louisville Cement Co. v. *I. C. C.*, 246 U. S. 638 20
Penna. R. R. v. *Clarke Coal Co.*, 238 U. S. 456 14
Phoenix Chamber of Commerce et al. v. *Director General*, 62 I. C. C. 412 ..... 2, 21
Phoenix Chamber of Commerce v. *Atchison, Topeka & Santa Fe Ry. Co.*, 95 I. C. C. 244 3
Phoenix Chamber of Commerce v. *Atchison, Topeka & Santa Fe Ry. Co.*, 140 I. C. C. 171 ..... 2, 3, 19
Prentis v. *Atlantic Coast Line*, 211 U. S. 210 15
Reduced Rates, 1922, 68 I. C. C. 676 ..... 3, 22
Southern Cement Rates, 132 I. C. C. 427 21
Tagg Bros. v. *United States*, 280 U. S. 420 ..... 9, 11
Texas & Pacific Railway v. *Abilene Cotton Oil Co.*, 204 U. S. 426 11
Texas & Pacific Railway v. *Cisco Oil Mill*, 204 U. S. 449 15
Topeka Traffic Assn. v. *A. & V. Ry. Co.*, 27 I. C. C. 428 12

STATUTES

Interstate Commerce Act, U. S. Code, Title 49, 1:
Section 1 (4) 4–5, 8, 10
Section 1 (5) 5, 8, 10
Section 8 5
Section 9 6
Section 13 (1) 6–7
Section 15 (1) 7, 12
Section 16 (1) 7–8

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Pursuant to leave of the Court, the Interstate Commerce Commission, hereinafter referred to as the Commission, submits this brief to emphasize the importance to it and to the public of the questions presented in this case as to the power and authority of the Commission to award reparation to shippers.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 438) is reported in 49 F. (2d) 563.

The report of the Commission is in 140 I. C. C. 171 and at R. 18.

QUESTIONS PRESENTED

The question which is of importance in the administration of the Interstate Commerce Act is whether the Commission has power and authority to award reparation on shipments made on rates exacted by carriers subject to the Interstate Commerce Act, which were established pursuant to an order of the Commission fixing reasonable rates.

While other questions are raised by the respective parties, this brief will be confined in the main to a discussion of that question.

STATEMENT

The Proceedings Before the Commission

By its decision of June 22, 1921, the Commission found unreasonable the rates of $1.045 per hundred pounds on sugar from California points to Phoenix, Ariz., and that, for the future, rates on that commodity would be unreasonable to the extent that they exceeded 96.5 cents. (*Phoenix Chamber of Commerce et al.* v. *Director General*, 62 I. C. C. 412.) An order entered pursuant to these findings required the defendant carriers to establish rates which should not exceed 96.5 cents per hundred pounds.

In compliance with that order the carriers established a rate of 96 cents September 17, 1921. This was reduced to 86.5 cents July 1, 1922, pur-

suant to the recommendation of the Commission in *Reduced Rates, 1922,* 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents. (Finding 4 of District Court's Findings of Fact, R. 366.)

In a decision dated January 6, 1925, the Commission again considered the rate on sugar between California and Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 cents prior, and 71 cents subsequent to July 1, 1922. Those complainants who had made shipments were held entitled to reparation. (*Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.,* 95 I. C. C. 244.) A rate of 71 cents was thereupon put into effect on February 25, 1925. (Finding 5 of District Court's Findings of Fact, R. 368.)

The orders involved in the instant case were made pursuant to the Commission's decision and order dated March 12, 1928, upon complaint filed February 9, 1925, in *Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et. al.,* Docket No. 16742, 140 I. C. C. 171 (R. 18), which awarded reparation on shipments made between February 21, 1923, and February 10, 1925, upon which charges of 86.5 cents and 84 cents were exacted. In that case the Commission further considered the rates and held unreasonable, prior to July 1, 1922, rates in excess of 79 cents

and 81 cents from southern California and northern California points, respectively, to Phoenix, and from July 1, 1922, to the date of its order therein, rates in excess of 71 and 73 cents, respectively. For the future there were prescribed rates not to exceed 61 and 73 cents, respectively. (Findings 4 and 6 of District Court's Findings of Fact, R. 367, 368, 369.)

The Proceedings in Court

To enforce the reparation awarded, there were instituted in the United States District Court for the District of Arizona two suits which were consolidated for trial and a jury waived. (R. 118, 119, 240.) Findings of Fact and Conclusions of Law were made by the trial court (R. 355) and judgments in favor of complainants and against the defendant carriers were entered (R. 225, 228).

Upon appeal, the Circuit Court of Appeals reversed the judgments. (R. 463, 464.) A petition for certiorari was granted by the Court October 12, 1931. (R. 467.)

THE STATUTES

Pertinent in the consideration of this case are the following provisions of the Interstate Commerce Act as amended (U. S. Code, Tit. 49, c. 1):

Section 1 (4):

> It shall be the duty of every common carrier subject to this Act engaged in the

transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, * * *.

Section 1 (5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

Section 8:

That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *

Section 13 (1):

That any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be

specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15 (1):

Whenever, after full hearing, upon a complaint . . . or . . . under an order for investigation and hearing made by the Commission on its own initiative, . . . the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, . . . the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case . . .

Section 16 (1):

That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any

party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

SUMMARY OF THE ARGUMENT

A controverted question between the parties is whether an order of the Commission fixing *maximum* rates, which is conformed to by the carrier filing tariffs publishing a rate less than the maximum is a rate "fixed by the Commission." We leave to the parties discussion of that question and confine this brief to what appears to us to be the broader question, which is whether the rates exacted, upon which reparation was allowed, must be held to be *reasonable* rates, regardless of the facts, because established pursuant to order of the Commission.

Section 1 (4) requires carriers subject to the Act to "establish * * * just and reasonable rates, fares, and charges" and Section 1 (5) declares that "all charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable" and that "every unjust and unreasonable charge for such service * * * is prohibited and declared to be unlawful." Hence there is a continuing duty upon carriers to observe these mandates and the prescription of maximum rates by the Commission

does not absolve the carriers from that statutory obligation or authorize the continuance of a charge which by reason of changed conditions has become unreasonable and unjust. A reasonable rate may become unreasonable. *Baer Bros. Mercantile Co.* v. *D. & R. G. R. Co.*, 233 U. S. 479. Such an order is not *res judicata*. *Tagg Bros.* v *U. S.*, 280 U. S. 420, 445.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act by exaction of an unreasonable rate—a tort. *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. If the Commission finds the rate exacted unreasonable, it matters not that the rate at some time, prior to that for which reparation is awarded, was held to be reasonable by the Commission.

A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being litigated before the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award.

In the instant case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the prior maximum rates had been authorized, and that the rates here

involved were repeatedly under fire of the shippers.

The action of the Commission in awarding reparation was consistent with that in other cases.

In the present case the subsequent reduction of those rates by the voluntary action of the carriers warrants a conclusion that such reduced rates were not prescribed by the Commission. *Brimstone Railroad & Canal Co.* v. *U. S.*, 276 U. S. 104, 122; *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443.

ARGUMENT

I

There is a continuing duty upon common carriers subject to the Interstate Commerce Act to exact only rates, fares, or charges which are reasonable. The fixing by the Commission of rates as reasonable does not absolve the carriers from that duty

Section 1 (4) imposes upon carriers subject to the Act the *duty* "to establish just and reasonable rates, fares, and charges" for transportation, and Section 1 (5) prescribes that "all charges for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable * * *" and prohibits "every unjust and unreasonable charge * * *" and declares it unlawful.

It is clear, therefore, that the initiation of rates is left to the carriers with the specific injunction for reasonableness, and the determination of reasonableness rests upon the carriers in the first in-

stance. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439; *I. C. C.* v. *L. & N. R. R.*, 227 U. S. 88, 92. Now, since a reasonable rate may become unreasonable and a rate reasonable at one time does not necessarily remain so for all time, *Tagg Bros.* v. *U. S.*, 280 U. S. 420, 445, it is likewise clear that there remains with the carriers the ever-present, continuing duty of keeping rates in harmony with the changing conditions and the shifting circumstances by which the question of reasonableness must be judged. There is no time limitation in the statute of the responsibility of the carriers with respect of reasonable charges. The Act prohibits every excessive charge, and its provisions are designed to prevent evasion of the rule that every charge for transportation shall be just and reasonable. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660.

The function of the Commission, as compared to the carrier, with respect to rates is secondary and revisory. That is, the Commission either on complaint or upon its own motion, pursuant to the authority of Section 15 (1) considers rates already established by the carriers. These rates presumably reflect the latters' judgment of reasonableness. Upon the developments of its investigation the Commission determines the reasonableness of the rates involved and prescribes what is or shall be a reasonable rate, thus substituting its judgment for that of the carriers, in cases

where it finds unreasonableness. Such a determination, while necessarily and in terms looking to future operation, is, of course, predicated upon the then existing conditions and circumstances. But the *reasonable* rate of to-day may be the *unreasonable* rate of to-morrow. *Topeka Traffic Assn.* v. *A. & V. Ry. Co.*, 27 I. C. C. 428, 433. "The world and its myriads of affairs are never the same two days in succession." *Atchison, T. & S. F. Ry. Co.* v. *U. S.* (Western Grain Rate Case), 51 F. (2d) 510, 516.

When the language of Section 1 (4) and (5) is contrasted with that of Section 15 (1), it will be seen that there is no duty imposed upon the Commission such as that imposed upon the carriers. The provisions of Section 15 (1) are that the Commission may, upon its own motion, and must, upon complaint, inquire into the reasonableness of rates and prescribe reasonable rates when deemed proper. That falls far short of making it the *duty* of the Commission to see that rates are kept currently reasonable. But Section 1 (4) and (5), as we have seen, does impose that duty upon the carriers. There are good reasons for this.

A carrier is in much better position than the Commission to determine as to particular rates whether conditions in respect of operation, transportation, cost of service, markets, etc., have so changed as to warrant a different conclusion as to the reasonableness of rates previously established

as such either by itself or by the Commission. Thus the wisdom of Congress in placing the obligation on the carriers is shown. The fact that the Commission has taken no action to revise a rate once established by it as reasonable does not relieve the carrier of its duty under the law. The carriers may not shut their eyes to the vicissitudes of business and transportation and rest supinely upon a more or less distant past finding of the Commission.

It can not in reason be asserted that the Commission is under the necessity of constantly supervising and readjusting thousands of rates, involving many carriers to the end that when once established they be kept currently reasonable at all times. Surely, Congress intended no such burden to be imposed, and the statute is evidence of that.

The basis on which the decision of the Circuit Court of Appeals was predicated was that while, in exercising its rate-making functions, the Commission is not bound by any doctrine of *res judicata*, since it is acting in its administrative or legislative capacity, yet in awarding reparation it acts in a judicial capacity; that since it had in effect in 1921 prescribed as a reasonable or lawful rate a maximum rate not to exceed 96.5 cents, that rate was a Commission-made rate and hence could not be said to be unlawful until changed by it, and therefore exaction of such rate prior to the change could not be said to be unlawful—a tort—constituting a basis for reparation. But the provisions allowing rep-

aration presuppose a reasonable rate that may become unreasonable. (Compare *Baer Bros.* v. *Denver & Rio Grande R. R.*, 233 U. S. 479, 488.) The carrier's duty is not discharged by merely *establishing* a reasonable rate as required by Section 1 (4). It must not charge that rate if it becomes unreasonable, otherwise Section 1 (5) is violated.

We think there is no difference with respect to reparation between a rate established by the carrier and one established by order of the Commission. The Act makes none. The sole question is whether for the period for which reparation is sought, the rate exacted was unreasonable, that is, has there been a violation of the Act? Reparation is allowed for the collection by a common carrier of *exorbitant* charges, which constitutes a tort. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.* The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate. *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 240.

As a basis for reparation, either in a proceeding before the Commission or in the courts, *Penna R. R.* v. *Clarke Coal Co.*, 238 U. S. 456, 469, 470, there must be a finding that the rate exacted was unreasonable and hence unlawful. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra,* at p. 661.

While in fixing a rate for the future the Commission exercises a legislative function, *Prentis* v.

Atlantic Coast Line, 211 U. S. 210, 226, yet strictly speaking the rate for the future has no relevancy to the reparation claim since the award of reparation is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper arising from a violation of the Act by the carrier. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order. *Baer Bros.* v. *Denver & Rio Grande R. R., supra,* at page 486.

A distinction should be noted between a *legal* rate and a *lawful* rate. Whether fixed by the carrier voluntarily or pursuant to an order of the Commission, if the provisions of Section 6 requiring filing and posting of schedules is complied with, the rate specified therein is the *legal* rate from which the carrier may not depart. (Sec. 6 (7).) *Texas & Pacific Ry.* v. *Cisco Oil Mill,* 204 U. S. 449; *Keough* v. *C. & N. W. Ry. Co.,* 260 U. S. 156, 163. That is so even though that rate is in violation of law. *Davis* v. *Portland Seed Co.,* 264 U. S. 403.

This distinction between a *legal* and a *lawful* rate is pointed out in *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.,* 16 I. C. C. 95, where the Commission said (p. 97):

> But the first section of the act, following the rule of the common law, declares that all charges for services rendered by a carrier

> in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or a schedule of rates the carrier therefore acts under this admonition of the statute. If it promulgates a rate in violation of this injunction, that is to say, if it establishes a rate that is excessive and therefore unjust and unreasonable, it is not a lawful rate when its reasonableness is subsequently questioned upon complaint filed. While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication can not make a rate lawful that is unreasonable and excessive. No rate can be lawful, in the sense of being immune from attack, either with respect to past or future shipments, if it be excessive and unreasonable in amount.

If the requirements of Section 1 (5) are kept in mind, there can be no inconsistency in awarding reparation for the exaction of a "Commission-made rate," which is in effect the *legal* rate until changed, but not necessarily the *lawful* rate, if subsequently it becomes in fact unreasonable.

The Fifth Circuit Court of Appeals in *Eagle Cotton Oil Co.* v. *Southern Railway Co.*, 51 F. (2d) 443, considered a case involving facts quite similar to those in the case at bar. In that case the trial court had denied a recovery sought under a rep-

aration order of the Commission on the ground that the rate exacted was a Commission-made rate. The Court of Appeals' judgment of reversal was rested upon the proposition that the rate was not Commission-made but carrier-made, but Circuit Judge. Hutcheson placed his concurrence on the broad ground that it is immaterial whether the rate made the subject of the reparation order was Commission-made or carrier-made, if the shipper has been injured by it.

In his concurring opinion, page 445, he referred to the fact that Congress in the Act has placed upon the carriers the burden of establishing and maintaining just and reasonable rates, that the Interstate Commerce Commission under its grant of authority has, by practice and in its decisions, sanctioned and approved by the courts, built up for itself a character of flexibility in the approach to, the consideration and determination of, rates and practices, and the results flowing therefrom in which the principle of *res judicata* has had and can have no just place; that Congress has not changed this settled character of the Commission, although it might have, if it so willed, converted it into a body like the state commissions, which fix and prescribe rates in a rigid and final way binding on both carrier and shipper, except for appeal to the courts. Further, with respect to the system under which the Commission functions, he said (p. 447):

* * * This system permits rates to be experimentally laid down and experimentally tried out. It preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary or particular inequalities and imperfections of this rate structure.

For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable, and wholly without legal warrant.

II

The order of the Commission awarding reparation was predicated upon a finding made upon a comprehensive record which for the first time presented fully the question of the reasonableness of the rates involved. The action of the Commission was consistent with its action in other cases

In its report awarding reparation, 140 I. C. C. 171, the Commission said (p. 180):

> Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss* v. *Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then

it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

It has taken like action in other cases: *Eagle Cotton Oil Co.* v. *Southern Ry. Co. et al.*, 140 I. C. C. 131; *Arizona Corporation Commission* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 156 I. C. C. 418, 425, 426; *Brannon Coal Co.* v. *Southern Ry. Co.*, 157 I. C. C. 486, 487.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act—in this instance by exaction of an unreasonable rate resulting in a tort. *L. & N. R. R.* v. *Sloss-Sheffield Co., supra; Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.* If the Commission finds that the rate exacted is unreasonable, it matters not that at some time prior to that for which reparation is awarded the rate was held to be reasonable. A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being investigated by the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award. It would destroy the right given by the statute (Sec. 16 (3) (b)) whereby reparation may be allowed for a period two years prior to the filing of the complaint. *Louisville Cement Co.* v. *I. C. C.*, 246 U. S. 638.

It would amount to a declaration that a prior established reasonable rate, which had become unreasonable, was still reasonable. This would in effect amend the Act in so far as it prohibited and declared unlawful the exaction of an unreasonable charge.

Moreover, the record discloses that the rates on sugar from California to Phoenix were the subject of much consideration by the Commission. The case which resulted in the order of June 22, 1921, 62 I. C. C. 412, was the first of three cases. (Findings of Fact 4–6 of the District Court, R. 366–369.) So it may fairly be said that there was constant agitation about the rates. In *Southern Cement Rates,* 132 I. C. C. 427, one of the cases included therein sought reparation. The Commission adverted to the fact that as a general rule reparation had been denied where general readjustments had been made in extensive territories. Considering whether there were any circumstances which should take the case out of the general rule, it was said (p. 467):

> * * * The evidence further shows that this complainant has for the past eight years been endeavoring to secure a lower basis of rates, one more in line with the rates which its competitors have enjoyed, and has kept the carriers constantly informed of its desires. It has had reason to believe, indeed, that such reductions would be forthcoming.

III

It may well be urged that the rates involved were not "Commission-made"

We present this point because we consider it our duty to do so. However, the main interest of the Commission is in the question hereinbefore discussed of the power of the Commission in respect of reparation involving Commission-made rates, since a decision on that point will serve as a guide and authority in its administration of the Interstate Commerce Act.

The order of June 22, 1921, in the "first" *Phoenix case* required the establishment of rates not in excess of 96.5 cents per cwt. The carriers established a rate of 96 cents; this was voluntarily reduced to 86.5 cents pursuant to the recommendation of the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents, which remained in effect until February 25, 1925 (District Court's Findings of Fact 4 and 5, R. 367, 368).

In *Eagle Cotton Oil Co.* v. *Southern Ry., supra*, upon quite similar facts, the Circuit Court of Appeals held that the rates there under consideration were not "Commission-made." In the opinion, after discussing the changes made in the rates, it was said (p. 445):

* * * The most that can reasonably be contended for in support of the proposition adopted by the trial court that the $2.03 rate was Commission-made is that it resulted from adding to and building up the rate of $1.20 that was authorized by the Commission. Aside from the fact that the Commission's order entered in 1915, establishing the $1.20 rate, had expired by limitation long prior to the decisions in Ex Parte 74 and in Reduced Rates, 1922, the law, as we understand it, is that orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as giving approval of or prescribing particular rates. In Brimstone R. & Canal Co. v. United States, 276 U. S. 104, at page 122, the Supreme Court said: "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. . . . In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates—and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration." It is true that case was dealing with a division of rates, but the principle involved is the same here as it was there. The Supreme Court in that case cited with approval, among other decisions of the Commission, Steel & Tube Co. v. Director General, 61 I. C. C. 526, in which the Commission

said that its "sanction of a general adjustment does not carry with it the approval of any particular rate."

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals was erroneous and should be reversed and that the judgment of the District Court awarding damages should be affirmed.

H. L. UNDERWOOD, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel.

NOVEMBER, 1931.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 98.

ARIZONA GROCERY COMPANY, *Petitioner,*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents.*

ARIZONA GROCERY COMPANY, *Petitioner,*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

Application by the Arizona Corporation Commission for Leave to File a Brief Amicus Curiae, and Accompanying Brief in Support of the Petition for a Writ of Certiorari.

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INDEX.

	Page
APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE	1
BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI	3
Statement of the Interest of the Arizona Corporation Commission	3
Statement of Facts	4
The Court Should Grant the Writ	6
Opposite Construction of the Law by the Court of Appeals of the Fifth Circuit	14
Under the Interstate Commerce Act the Commission Had Jurisdiction to Make the Award	15

TABLE OF CASES CITED.

Consolidated Southwestern Cases, 123 I. C. C. 203	12
Eagle Cotton Oil Co. v. Southern Ry. Co. (decided July 21, 1931; not yet reported)	14, 21
Eastern Class Rate Investigation, 164 I. C. C. 314	12
Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184	20
Phoenix Chamber of Commerce et al. v. Director General, 62 I. C. C. 412	4
Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Ry. Co., 95 I. C. C. 244	5
Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Ry. Co., 140 I. C. C. 171.	5

Page

Rate Structure Investigation, Part 2, Western Trunk-Line Class Rates, 164 I. C. C. 1....10, 12

Rate Structure Investigation, Part 3, Cotton, 165 I. C. C. 595 10

Rate Structure Investigation, Part 4, Petroleum and Petroleum Products, 171 I. C. C. 286... 10

Rate Structure Investigation, Part 4-A, Rates on Refined Petroleum Products From, To and Between Points in the Southwest, 171 I. C. C. 381 10

Rate Structure Investigation, Part 5, Furniture, 177 I. C. C. 5 10

Rate Structure Investigation, Part 6, Iron and Steel Articles, 155 I. C. C. 517..... 10

Rate Structure Investigation, Part 7, Grain and Grain Products Within the Western District and for Export, 164 I. C. C. 619..... 10

Rate Structure Investigation, Part 9, Livestock-Western District, 176 I. C. C. 1..... 10

Rate Structure Investigation, Part 9, Livestock-Southern Territory, 171 I. C. C. 721..... 11

Rate Structure Investigation, Part 11, Sand and Gravel, 155 I. C. C. 247 11

Rate Structure Investigation, Part 11-A, Sand and Gravel From Kansas and Missouri (decided July 7, 1931; not reported)..... 11

Reduced Rates, 1922, 68 I. C. C. 676.....4, 12

Southern Class Rate Case, 100 I. C. C. 513..... 12

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.....19, 20

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SOUTHERN PACIFIC COMPANY ET AL., *Respondents*.

Application by the Arizona Corporation Commission for Leave to File a Brief Amicus Curiae in Support of the Petition for a Writ of Certiorari.

The Arizona Corporation Commission respectfully asks leave of the court to file a brief *amicus curiae* in support of the petition for a writ of certiorari in

the above entitled proceeding. The interest of said Commission in said proceeding is set forth in the brief which it asks leave to file, which brief is hereto attached.

ARIZONA CORPORATION COMMISSION,
By
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IN THE

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ARIZONA GROCERY COMPANY, *Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

Brief of Arizona Corporation Commission in Support of the Petition for a Writ of Certiorari in the Above Entitled Proceeding.

STATEMENT OF THE INTEREST OF THE ARIZONA CORPORATION COMMISSION.

The Arizona Corporation Commission is a regulatory commission, established by the Constitution of the State of Arizona, having jurisdiction over the intrastate rates and services of common carriers by railroad within said state. Under the law of Arizona it is also the duty of said Commission, whenever, in the exercise of its discretion, it shall deem it expedient so to do, to represent the interests of interstate shippers generally in the State of Arizona, in any

proceeding wherein are involved the rights of said shippers in the matter of such railroad rates as are subject to the jurisdiction of the Interstate Commerce Commission.

Section 16 (1) of the Interstate Commerce Act confers jurisdiction upon the Interstate Commerce Commission to make awards of reparation to shippers in cases wherein, after hearing, the Commission finds that unjust and unreasonable rates have been exacted from them. The decision rendered in the above entitled proceeding in the court below, if the same shall be sustained, will operate in effect as a repeal of that statutory provision. Because that provision is a valuable safeguard to interstate shippers of the state of Arizona against the imposition of unreasonable rates, and because its destruction would be a very great injury to such shippers and to said State, the Arizona Corporation Commission believes that it should file in this court a brief pointing out the grounds upon which the judgment of the court below should be set aside.

STATEMENT OF FACTS.

On June 22, 1921, in *Phoenix Chamber of Commerce et al. v. Director General,* 62 I. C. C. 412, the Interstate Commerce Commission found that rates on sugar from California points to Phoenix, Arizona, would in the future be unreasonable to the extent that they exceeded 96.5 cents. An order was made requiring the carriers to establish rates not exceeding that level. They established a rate of 96 cents.

On May 16, 1922, in *Reduced Rates, 1922,* 68 I. C. C. 676, the Commission found the rates then existing to be unjust and unreasonable on and after July 1,

1922, unless reduced 10 per cent. The carriers, on January 10, 1924, thereupon reduced the rates on sugar from California points to Phoenix to 84 cents.

On January 6, 1925, in *Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Co.*, 95 I. C. C. 244, the Commission found that the rate from California points to Phoenix would for the future be unreasonable to the extent that it should exceed 71 cents per 100 pounds, and made an order accordingly. A rate of 71 cents was thereupon established by the carriers, effective February 25, 1925.

On March 12, 1928, in *Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Co.*, 140 I. C. C. 171, the Commission found that the rate on sugar from Southern California points to Phoenix prior to July 1, 1922, was unjust and unreasonable to the extent that it exceeded 79 cents, and that the like rate from Northern California points to Phoenix was unreasonable to the extent that it exceeded 81 cents prior to July 1, 1922, and that those rates were unreasonable subsequently to July 1, 1922, to the extent that they exceeded 71 cents and 73 cents, respectively. An order was made which awarded reparation upon shipments which moved subsequently to July 1, 1922, and prior to the taking effect of the 71-cent rate required by the Commission's decision of January 6, 1925. Some of these shipments, upon which reparation was awarded, moved under the 96-cent rate and some the 84-cent rate.

Actions to recover the reparation awarded were brought in the United States District Court for the District of Arizona. These were submitted to the court on agreed statements of fact (Record 254-319). Judgments were rendered in favor of the Arizona

Grocery Company (Record 228). Upon appeal the United States Circuit Court for the Ninth Circuit reversed the District Court. The petition for certiorari in this proceeding was filed to review that judgment.

The opinion of the Circuit Court is reported 49 Fed. Rep. (2d) 563. The decision of the court is based upon the proposition that when the Interstate Commerce Commission has once found and by order established a maximum rate level, and carriers have established rates which do not exceed that level, neither the Commission nor any court can find such rates unreasonable, and make any award of reparation thereon.

The issue to be determined is whether rates exacted by a carrier which conform to a tariff not violative of an outstanding order of the Interstate Commerce Commission prescribing a maximum rate level are conclusively presumed to be lawful, or may be attacked in reparation proceedings, and made the basis of a reparation award, if in fact unreasonable.

THE COURT SHOULD GRANT THE WRIT.

The issuance of the writ prayed for is asked upon various grounds. We shall discuss but one, which in the petition is stated as follows:

> "1. The matter of the right and power of the Interstate Commerce Commission to award reparation to a shipper when it finds that such shipper has paid rates which were unreasonable, whether such rates were equal to or less than a previously approved maximum rate, involves an important question of federal law which has not

been, but should be, settled by this Honorable Court."

It is admitted by the respondents, at page 21 of their brief filed herein, "that the instant proceeding involves an important question of federal law." They say, however, "But it does not necessarily follow that this Court is required to review the Circuit Court's decision." The respondents urge that the question involved has been settled, "indirectly at least"; and cases in support of that contention are cited. We believe, however, that an examination of those cases will show that the question at issue herein has never been considered, or settled in principle by this court.

We accordingly proceed to discuss briefly the supreme importance of the question involved, which should lead this court to issue the writ prayed for, to the end that it may review the judgment below and authoritatively settle the question of law involved.

Upon the decision of that question will depend whether the Interstate Commerce Commission will hereafter exercise the power to award reparation for damages caused by the exaction of unreasonable rates. If the decision of the court below shall be permitted to stand, and shall be followed by the Commission and by the lower federal courts, the rule therein laid down will shortly operate to all intents and purposes as a repeal of the reparation provisions of the Interstat Commerce Act.

The court below held that the order of the Commission "fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable

and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established and that the order of the Commission amounted to a decision that rates fixed by the carrier below the maximum it had established were just and reasonable."

The court also held that the Commission is without jurisdiction to award reparation for the exaction of rates published in a tariff which was in conformity with an outstanding order of the Commission. Upon this point the court said:

> "The contention is that the Commission could revise its original findings as to what was in fact a reasonable rate because in the first instance it acted as a law-making body—a legislature—and in the second it acted in a judicial capacity—as a court. * * * What follows? Is it not true that a court is bound in its determination by the law? Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (sec. 16, subd. 1), delegating power to the Commission to award reparations, limits that power to parties 'entitled to an award of damages under the provisions of this chapter (act) for a violation thereof. * * *'. (See, also, Transportation Act, sec. 10, subd. 8.) Is the court (the Commission in its quasi-judicial capacity) to say that a carrier has no lawful right to collect a rate established by law (that fixed by the Commission acting in its quasi-legislative capacity), or, having collected it, to retain it? It is true that the original order is not res judicata, but its effect

is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the legislature." (R., 451-452.)

"When, however, in regularly pursuing its delegated power, the Commission establishes a specific rate as reasonable in fact, the legislative power has so definitely established the specific rate thus fixed as just and reasonable that there is no longer room for judicial decision as to what is a just and reasonable rate. Congress, through its agent, the Commission, has established the measure by which the reasonableness of the rate is to be judged. In considering an application for damages for charging unreasonable rates a court, or the Commission acting as such, must confine its inquiry to the other factors involved in an award of reparations, such as the amount of freight moved, the point of origin and of delivery, the owner of the shipment, etc.; but if there is no excess charge there can be no award, for where the rate is one fixed by law it is not excessive in any legal sense." (R., 453-454.)

If this decision of the Circuit Court of Appeals is sound, then in large part the rates now in effect throughout the United States are beyond attack in reparation proceedings, no matter how unreasonable they may be in fact: and it will not be long before the same will be true of all rates.

The Interstate Commerce Commission is under a mandate from Congress, contained in the Hoch-Smith Resolution (43 Stat. L. 801), by which it is required to investigate rates of all carriers subject to the Interstate Commerce Act, "from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates

upon designated classes of traffic upon a just and reasonable basis with relation to other rates."

The Commission is proceeding to perform the duty laid upon it by this resolution in one comprehensive investigation which involves all rates of all railroads in every part of the United States. For purposes of convenience this investigation has been divided into various parts, or cases, some of which have been concluded, while the others are still in progress. Orders have already been made, as follows:

No. 17,000, *Rate Structure Investigation,* Part 2, *Western Trunk-Line Class Rates,* 164 I. C. C. 1.

No. 17,000, *Rate Structure Investigation,* Part 3, *Cotton,* 165 I. C. C. 595.

No. 17,000, *Rate Structure Investigation,* Part 4, *Petroleum and Petroleum Products,* 171 I. C. C. 286.

No. 17,000, *Rate Structure Investigation,* Part 4-A, *Rates on Refined Petroleum Products From, to and Between Points in the Southwest,* 171 I. C. C. 381.

No. 17,000, *Rate Structure Investigation,* Part 5, *Furniture,* 177 I. C. C. 5.

No. 17,000, *Rate Structure Investigation,* Part 6, *Iron and Steel Articles,* 155 I. C. C. 517.

No. 17,000, *Rate Structure Investigation,* Part 7, *Grain and Grain Products Within the Western District and for Export,* 164 I. C. C. 619.

No. 17,000, *Rate Structure Investigation,* Part 9, *Livestock-Western District Rates,* 176 I. C. C. 1.

No. 17,000, *Rate Structure Investigation,* Part 9, *Livestock-Southern Territory Rates,* 171 I. C. C. 721.

No. 17,000, *Rate Structure Investigation,* Part 11, *Sand and Gravel,* 155 I. C. C. 247.

No. 17,000, *Rate Structure Investigation,* Part 11-A, *Sand and Gravel From Kansas and Missouri* (decided July 7, 1931; not yet reported).

In each of these cases the Commission has exercised its power only to the extent of fixing maximum rate levels. In due time the Commission will make other orders until it will have dealt with all the rates of carriers covering every class of traffic in every portion of the United States. Each of these orders involves large classes of traffic over broad areas. It has been and will be manifestly impossible for the Commission to consider the facts surrounding each particular rate in such manner as to enable all rates to be placed upon just and reasonable bases. It is obvious that in such proceedings the Commission can consider only general rate levels.

When the carriers shall have filed tariffs conforming to the orders made and to be made in *Rate Structure Investigation,* under the Hoch-Smith Resolution, if the decision of the court below is sound, neither the Commission nor any court will thereafter have any jurisdiction to consider the reasonableness of particular rates, but, so long as the law shall remain unchanged, and the Commission's orders shall remain unrevoked, all rates whatsoever published in such tariffs will, as a matter of law, be conclusively presumed to be reasonable in any proceeding brought to

recover reparation for excessive charges, notwithstanding any unreasonableness in fact.

This same situation would have come about in the ordinary course of the Commission's administration of the Interstate Commerce Act, if the Hoch-Smith Resolution had not been adopted. For example, in a series of cases the Interstate Commerce Commission has established maximum levels of reasonable rates for all freight moving under class rates, throughout the United States east of the Rocky Mountains. These cases were *The Southern Class Rate Case,* 100 I. C. C. 513; *Eastern Class Rate Investigation,* 164 I. C. C. 314; *Consolidated Southwestern Cases,* 123 I. C. C. 203; and *Western Trunk-Line Class Rates,* 164 I. C. C. 314, above cited. All of these cases except the last were instituted before the Hoch-Smith Resolution was adopted. In each of them the Commission dealt with rates by establishing a maximum rate level.

Great numbers of other cases might be cited. Reference will be made, however, only to *Reduced Rates, 1922,* 68 I. C. C. 676, 734, 736. In that case the Commission dealt with all freight rates of every kind in the United States, and announced its decision as follows:

> "After considering all the facts of record, including the necessity of reasonable expenditures for additions and betterments, we find and determine: * * *
>
> "2. That the existing freight rates and charges, including charges for switching and other accessorial services and all other charges applicable to freight service which were increased by authority of *Increased Rates, 1920, supra,* will be on and after July 1, 1922, unjust and unreasonable to the

extent that they may respectively include more than the following percentages of increase over the rates in effect immediately prior to August 26, 1920, in and between the various rate groups as defined in *Increased Rates, 1920,* 58 I. C. C., 220, 489, and *Authority to Increase Rates,* ibid., 302:

"In the eastern group, also between points in Illinois territory and between Illinois territory and the eastern group, 26 per cent instead of the 40 per cent authorized in the decisions last cited.

"In the western group, and between the western group and Illinois territory, 21.5 per cent instead of the 35 per cent so authorized.

"In the southern and mountain-Pacific groups, 12.5 per cent instead of the 25 per cent so authorized.

"On interterritorial traffic, except as otherwise provided herein, 20 per cent instead of the 33⅓ per cent so authorized. * * *

"The respondents should advise us promptly, and not later than May 31, 1922, if possible, whether the findings herein will be carried into effect without formal order or orders by us."

In the several class rate cases orders have been made. In *Reduced Rates, 1922,* the carriers complied with the Commission's decision without a formal order. If an order in that case had been made, then in that single case, if the decision of the lower court is sound, the Commission would have completely ousted itself of all jurisdiction upon reparation claims, notwithstanding the manifest impossibility, in a case of such magnitude, of such consideration of particular rates as to assure the placing of such rates upon a just and reasonable basis.

Indeed, it may be argued that the decision of the

Commission announced in its report, in *Reduced Rates, 1922,* as to the maximum level, was the controlling fact; and that the carriers, by complying with that decision, without awaiting a formal order, did not place themselves in any less favorable position than they would have occupied had they awaited the order; and that hence the rates voluntarily established by the carriers in conformity with that decision, embracing practically all freight rates in the United States, are now in every instance reasonable in contemplation of law, and beyond question in reparation proceedings.

In any event, these cases just cited demonstrate that the Interstate Commerce Commission, if it has any jurisdiction yet remaining, is exercising a rapidly diminishing jurisdiction, as to awards of reparation, if the decision of the court below is a correct exposition of the law.

This suggestion is made to indicate the great importance of the question of law involved in this case, which renders it essential that this court shall settle that question conclusively by exercising its power to review the decision of the Circuit Court of Appeals herein.

THE OPPOSITE CONSTRUCTION OF THE LAW BY THE COURT OF APPEALS OF THE FIFTH CIRCUIT.

The necessity for a decision of this court to settle authoritatively the legal question involved is established by the opposite decision of that question by the Circuit Court of Appeals for the Fifth Circuit in *Eagle Cotton Oil Company vs. Southern Railway Company et al.;* rendered July 21, 1931 (not yet reported),

the opinion in which is printed in full in petitioner's supplemental brief herein.

UNDER THE INTERSTATE COMMERCE ACT THE COMMISSION HAD JURISDICTION TO MAKE THE AWARD.

The decision of the issue presented depends upon the construction of the Interstate Commerce Act, from which the following pertinent provisions are quoted:

> Section 1 (4) provides: "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish * * * just and reasonable fares, rates and charges applicable thereto * * *."
>
> Section 1(5) provides: "All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *."
>
> Section 8 provides: "That in case any common carrier * * * shall do * * * any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act * * *."

Section 9 provides: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction * * *."

Section 13(1) provides: "That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition * * *."

Section 16(1) provides: "That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

The Act, therefore, specifically makes it the duty of each carrier to establish just and reasonable rates, and prohibits and declares unlawful every unjust and unreasonable charge. It further grants to the Commission jurisdiction upon complaint to determine when any carrier has violated the Act; and to make an award for any damage caused any complainant by such violation.

The question for determination then is whether a carrier may exact rates in fact unreasonable without violating the Interstate Commerce Act, provided only that the rates exacted do not exceed a level fixed by order of the Interstate Commerce Commission as a maximum level. Otherwise stated, the question is, does the failure of the Interstate Commerce Commission to forbid a rate in fact unreasonable make it lawful for the carrier to exact that rate notwithstanding the prohibition contained in the Act.

The opinion of the court below holds that the prescription of a maximum rate level by the Commission is equivalent to a decision by the Commission that any rate upon or below that level is just and reasonable. The court therefore concludes that the exaction of such a rate can not be held unlawful, and made the basis for a reparation award.

This leaves out of account, however, the original plan of the Act, which has, in this respect, been continued to this time. As originally enacted, the Act to Regulate Commerce made it the duty of the carriers to conform their rates to the standard of reasonableness prescribed by the Act; and gave to anyone injured by any failure in that respect a remedy by complaint before the Commission, which was granted jurisdiction to determine and award damages. The Commission's jurisdiction has been greatly enlarged since the Act to Regulate Commerce was passed, but the carriers have never been relieved from the duty placed upon them by the common law, and reaffirmed in Section 1 of the Act, to keep their rates just and reasonable; and the Commission has never been relieved of its duty to hear and determine complaints

against carriers alleging damages resulting from failure to perform this duty.

There are two obvious reasons for this: The United States is so vast, the number of carriers is so great, and their rates so multitudinous, that it passes the human capacity of the men composing any tribunal to survey all the rates of the United States and to place all of them upon a just and reasonable basis. Hence when dealing with rates generally, the Commission can not know that any general rate order which it may make will operate to give to every individual shipper just and reasonable rates. Furthermore, conditions which affect the reasonableness of rates are not static. They change from time to time, so that rates which are just and reasonable at one time may at a later time be unjust and unreasonable. Hence the fact that a given rate conforms to an order of the Interstate Commerce Commission which is still outstanding does not afford any assurance that it is just and reasonable.

For these reasons the Congress, although it has successively enlarged the power of the Commission, giving it in 1906 jurisdiction to prescribe reasonable maximum rates (34 Stat. L. 589, Sec. 4), in 1920, in Transportation Act, 1920, whereby Section 15(1) was brought into its present form, the power to fix reasonable minimum rates, and in 1925, in the Hoch-Smith Resolution, directing it to survey all rates with the purpose in view of enforcing the standards prescribed by the Interstate Commerce Act, yet it has never relieved the Commission of its reparation jurisdiction or deprived shippers of their right to invoke that jurisdiction.

It therefore is the duty of each carrier to keep its

rates just and reasonable, in view of the conditions at any time existing. After rates have been established which are within the limits permitted by some order of the Commission, it is still the continuing duty of the carrier to keep familiar with changing conditions, and to adapt its rates to those conditions by necessary changes in its tariffs.

Nothing can better illustrate the necessity for continuing this duty on the part of the carriers, and for continuing also jurisdiction on the part of the Commission to enforce it by awards of damages, than the series of decisions in general rate cases, involving rate structures extending over great areas, which have been cited on this brief. The impossibility of considering particular rates in such proceedings is manifest. If shippers are not to be subjected to injury without redress some forum must be provided to them to which they may make complaint of unreasonable rate exactions, and from which they may procure awards compelling reimbursement for damages which they show.

It has heretofore been held by this Court that the provisions of the Interstate Commerce Act have operated to terminate the primary jurisdiction of the court; and that, as the law stands now, application for reparation must first be made to the Commission. *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426. The decision below, however, is based upon the theory that the law itself creates a conclusive presumption of reasonableness applicable to all rates fixed in tariffs conforming to the limitations of a maximum rate order of the Commission.

If this decision is sound, the individual shipper has, by operation of the very legislation which was designed for his benefit, been placed in a worse position than he occupied before the Act to Regulate Commerce was passed. Under the common law he could contest in court the legality of rates deemed by him unreasonable and could recover damages for illegal exactions from him. *Texas & Pac. Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426, 436. Now, he may not escape payment of the rate fixed by any tariff filed and in effect under the law, for, so far as he is concerned, the tariff itself has the same effect as a statute. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 197.

The shipper must, accordingly, pay the rate fixed in any lawfully published tariff, and, under the decision below, if that tariff conforms to an outstanding order of the Commission, he may not thereafter before any tribunal assert that it is unjust and unreasonable and ask reimbursement for damages caused him by the exaction from him of the rates fixed therein.

It therefore follows, if the decision below is sound, that the Commission in a general rate case may prescribe a maximum general rate level under which rates may take effect grossly unreasonable for particular shippers, by reason of particular circumstances which have never been considered by the Commission, and yet those who suffer from such rates will have no redress anywhere. They may, it is true, carry on litigation before the Commission to require their unreasonable rates to be changed; but the unreasonable payments exacted from them prior to application to the Commission, and during the years that

the litigation instituted before the Commission may be in progress, are irretrievably lost.

The decision of the court below that the Commission was without jurisdiction to make the award involved in this case rests upon no express provision of the Interstate Commerce Act or of any amendment thereto. If the Commission has been deprived of the jurisdiction which the Act once gave it to make awards requiring reimbursement of sums exacted through the imposition of unreasonable rates, such deprivation must arise from an implication inhering in some amendment to the Act; but neither in the language of any amendment, nor in anything connected with its legislative history, can there be found a basis for the conclusion that Congress by any such amendment has intended to subject rate payers to unreasonable exactions, through the imposition of rates never in fact considered by the Commission, without providing any means of redress whatsoever.

We cite the decision of the Circuit Court of Appeals of the 5th Circuit in *Eagle Cotton Oil Co. v. Southern Railway Co. et al.* (decided July 21, 1931; not yet reported), and in particular the concurring opinion of Judge Hutcheson therein.

Respectfully submitted,

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Attorneys for Arizona Corporation Commission.

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CHARLES E.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents*

ARIZONA GROCERY COMPANY, *Petitioner*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

APPLICATION BY THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND ACCOMPANYING BRIEF IN SUPPORT OF THE PETITION.

JOHN E. BENTON,
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Washington, D. C.

THE J. W. STOWELL PRINTING COMPANY, FREDERICKSBURG, MD.

INDEX.

Page

APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE 1

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 2

Statement of the Interest of the National Association of Railroad and Utilities Commissioners 2
Opinion Below 3
Statement of the Case 3

Statement and Argument of Arizona Corporation Commission Brief Adopted 3

Summary of Additional Argument 5

The Interstate Commerce Act Lays Upon Carriers the Duty to Keep Their Rates at all Times Just and Reasonable, and Failure to Perform this Duty Constitutes a Violation of the Act, the Resulting Damages from which may be Recovered in Reparation Proceedings 5

The Interstate Commerce Commission, When Acting Upon Reparation Claims, Exercises a Power Distinct from its Rate Making Power, and Directed to a Distinctly Different Purpose 9

The Decisions of State Courts Dealing with State Statutes Are Not Applicable 10

The Rates Involved Were Not Commission-Made 10

TABLE OF CASES CITED.

Baer Bros. Mercantile Co. v. D. & R. G. R. Co., 233 U. S. 479 9
Brimstone R. R. Co. v. United States, 276 U. S. 104 7
Eagle Cotton Oil Co. v. Southern Railway, 51 F.(2d) 443 10
Ex Parte 74, 58 I. C. C. 220 7
I. C. C. v. Baltimore R. Co., 145 U. S. 265 6
News Syndicate Co. v. New York Central R. R., 275 U. S. 179 9
Reduced Rates, 1922, 68 I. C. C. 676 4
Steel & Tube Co. v. Director General, 61 I. C. C. 526 7
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 . . . 7
Texas and Pacific Railway v. Gulf, Colorado & Santa Fe Railway, 270 U. S. 266 7

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APPLICATION BY THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN THE ABOVE ENTITLED PROCEEDING IN SUPPORT OF THE PETITION THEREIN.

The National Association of Railroad and Utilities Commissioners asks leave of the Court to file a brief amicus curiae in support of the petition in the above entitled proceeding. The interest of said Association in said proceeding is set forth in the brief which it asks leave to file, which brief is hereto attached.

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 98

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS IN THE ABOVE ENTITLED PROCEEDING IN SUPPORT OF THE PETITION THEREIN.

Statement of the Interest of the National Association of Railroad and Utilities Commissioners.

This brief is filed on behalf of the National Association of Railroad and Utilities Commissioners at the direction of that Association contained in a resolution adopted at its 1931 annual convention, held in Richmond, Virginia, October 20-23, 1931. Said Association is a voluntary Association embracing within its membership the members of the commissions and boards of the several states of the United States exercising regulatory jurisdiction over the intrastate rates and services of common carriers by railroad. Under the laws of many of said states it is the duty of the

respective commissions, in the exercise of discretion, to represent the interests of the public in their respective states in any proceeding pending before the Interstate Commerce Commission or in the federal courts in which interstate rates may be involved.

Section 16(1) of the Interstate Commerce Act confers jurisdiction upon the Interstate Commerce Commission to make awards of reparation to shippers in cases wherein, after hearing, the Commission finds that unjust and unreasonable rates have been exacted. The decision rendered in this case by the Court of Appeals, if the same shall be sustained and hereafter followed as establishing a rule of general application, will operate in substantial effect to destroy the power to award reparation granted to said Interstate Commerce Commission, as aforesaid. Because this power is a valuable safeguard against the imposition of unreasonable rates, the destruction of which would be a great injury to the public generally, said Association, on behalf of the state commission, files this brief.

OPINION BELOW.

The opinion of the Court of Appeals is reported 49 F.(2d) 563. The opinion of the District Court is not reported.

STATEMENT OF THE CASE.

Statement and Argument of Arizona Brief Adopted.

The statement of the case contained in the brief heretofore filed in this proceeding by Arizona Corporation Commission is adopted for this brief. We likewise adopt the argument contained in that brief.

The question presented is whether the Interstate Commerce Commission has jurisdiction to award reparation for damages caused by the exaction of unreasonable rates when the rates complained of fall within the limits of a maximum rate order made by the Interstate Commerce Commission and continuing in effect at the time of the exaction of the rates.

The contention of the carriers, adopted as the basis of the judgment below, is that inasmuch as the rates involved in this proceeding conformed to the Commission's maximum rate order of June 22, 1921, and to the Commission's decision made May 16, 1922, in *Reduced Rates, 1922*, 68 I. C. C. 676, the Commission lacks jurisdiction to find such rates unjust and unreasonable, and to award reparation for their exaction.

The appellant, on the other hand, contends that the prescribing of a maximum rate level by the Commission does not establish that all rates not exceeding that level are just and reasonable so long as the order continues in effect; that the Interstate Commerce Act imposes a continuing duty upon all carriers subject to the Act to keep their rates at all times just and reasonable; that the carriers are not relieved from this duty by the making of a maximum rate order by the Commission; and that notwithstanding such an order, if a carrier exacts a rate which is in fact unjust and unreasonable, such exaction constitutes a violation of the Interstate Commerce Act, and renders the carrier liable for the damages resulting to shippers therefrom.

In the Arizona brief it was pointed out that the Interstate Commerce Commission often deals with rates in the mass, by maximum rate orders. It was, for example, pointed out that in the *Rate Structure Investigation*, No. 17,000, the Commission is engaged in an investigation of all rates and charges of the rail carriers, and is proceeding, from time to time, to deal with such rates by the making of maximum rate orders effective over vast areas, and that when the *Rate Structure Investigation* shall have been completed it is to be expected that maximum rate level orders will have been issued covering all of the freight transportation of the United States. It accordingly is obvious that if the ruling made below in this case shall be sustained, and established, the result will be that the Interstate Commerce Commission will presently be unable to exercise the power to grant reparation as to any freight rates, because all such rates will be within the limits of general maximum rate orders issued by the Commission. The result which would follow from the construction given to the Act in the Court

of Appeals is thus adverted to because it is believed that a construction which produces such a result can not be in accord with the intent of Congress.

SUMMARY OF ADDITIONAL ARGUMENT.

1. The Interstate Commerce Act lays upon carriers the duty to keep their rates at all times just and reasonable, and failure to perform this duty constitutes a violation of the Act, the resulting damages from which may be recovered in reparation proceedings.

2. The Interstate Commerce Commission, when acting upon reparation claims, exercises a power distinct from its rate making power, and directed to a distinctly different purpose.

3. The decisions of state courts dealing with state statutes are not applicable.

4. The rates involved were not Commission-made.

1. The Interstate Commerce Act Lays Upon Carriers the Duty to Keep Their Rates At All Times Just and Reasonable, and Failure to Perform This Duty Constitutes a Violation of the Act, the Resulting Damages From Which May be Recovered in Reparation Proceedings.

Section 1(4) provides: "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish *** just and reasonable fares, rates and charges applicable thereto ***."

Section 1(5) provides: "All charges made for any service rendered or to be rendered in the transportation of passengers or property *** shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. ***."

These two paragraphs are to be read together. The imposition of an unreasonable rate at any time is made unlawful. It is the duty of the carrier to establish rates which

are reasonable, and to keep the same reasonable by such changes from time to time as are requisite to that end.

This duty to make and keep rates reasonable was the common law duty of the carriers before the Act to Regulate Commerce was passed. It was not changed by that Act. Instead of following the Texas Act, and various other state acts, which provided that the respective state commissions should make the rates to be received by carriers, the Act to Regulate Commerce was directed towards compelling performance of this common law duty. That duty was expressed in the statute; the Commission was given jurisdiction to direct carriers to desist for the future from exacting rates found by the Commission to be unreasonable, and the Commission was furthermore given power to make awards of reparation to cover damages caused by past unreasonable exactions. The plan of the Act was to give emphasis to the common law duty by stating it in the statute, and to compel observance of it.

While the Commission's power to condemn rates as unreasonable, and to require the carrier to desist from further exaction thereof, has, by successive amendments, been enlarged until now the Commission can exercise rate-making power, the duty of the carriers to establish and maintain just and reasonable rates remains today exactly what it was when the Act to Regulate Commerce was originally enacted. This duty of the carrier extends to all its rates, however the same may have come originally into effect, i.e., whether originally made by the carrier at its own motion, or in conformity with some order of the Interstate Commerce Commission.

"The whole purpose of the Act (to Regulate Commerce) was to create and compel the enforcement, without discrimination, of rates which were just and reasonable", as was stated by the Court of Appeals in its opinion in the instant case. (Rec. 448).

This Court has said: "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation;—and to prohibit unjust discrimination." *I. C. C.* v. *Baltimore R. Co.*, 145 U. S. 265.

It is an elementary rule that a statute will be construed

to effectuate the purpose for which it was enacted: *Texas and Pacific Railway* v. *Gulf, Colorado & Santa Fe Railway*, 270 U. S. 266, 277.

To effectuate the purpose of the Act to secure just and reasonable rates Section 1 must be construed as obligating the carriers with respect to rates fixed in conformance with orders of the Interstate Commerce Commission, as well as rates made by the carriers on their own motion. Any other construction would make the Act defeat the purpose for which it was enacted, since by the Act the common law right of the shipper to seek reparation in the courts was abrogated. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Unless the Commission's power to award reparation extends to rates established under orders of the Commission the Act will be a shield of defense to the carriers in the perpetration of wrongs.

It is unavoidable that unjust rates will often be exacted. This is true because it is manifestly impossible that the Commission can keep itself informed as to the constantly changing conditions which affect the reasonableness of the countless rates which have come into effect under orders made by the Commission. It is especially true as to rates which have been established under maximum rate orders, for the reason that the Commission does not undertake in general rate cases to give consideration to particular rates.

When the rates here involved were advanced 25 percent under the authority of the Commission's decision in *Ex Parte 74*, 58 I. C. C. 220, the Commission authorized advances "without prejudice to any subsequent finding in individual situations", and expressly stated that the new rates "must necessarily be subject to such readjustments as the facts may warrant", and carriers were notified that they should deal with claims for readjustment "promptly and effectively."

The Commission expressly stated in its report in *Steel & Tube Co.* v. *Director General*, 61 I. C. C. 526, that "sanction of a general adjustment does not carry with it the approval of any particular rate."

This decision of the Commission was cited by this Court with approval in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, where the Court said:

"The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. *** In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

As has been before pointed out, the Interstate Commerce Commission in late years has developed the practice of dealing with rates in the mass, by the promulgation of maximum rate orders covering classes of rates and effective over vast areas. It now has in progress a single proceeding,—*Rate Structure Investigation*, No. 17,000,—upon completion of which all rates, or substantially all rates, throughout the United States will be covered by such orders, issued in that proceeding.

If shippers who may be subjected to unreasonable rates as an incident to these wholesale readjustments, or as an incident to changed conditions, may not apply to the Commission in reparation proceedings to recover damages to which they are subjected, they will be left without any remedy whatever, since, as we have seen, their common law right to apply to the courts for redress has been abrogated by the provisions of the Interstate Commerce Act.

If, therefore, the construction which was placed upon the Interstate Commerce Act by the Court of Appeals in the instant case shall be sustained, the purpose of the Act will be not promoted but defeated, and the carriers will be enabled to make unjust exactions with impunity, so long as they keep within the limits of some general rate order once issued by the Commission. Under such construction it would become in the interest of carriers to keep their rates, irrespective of their reasonableness, at the highest possible level, and, indeed, a premium would be placed upon failure to take note of changed conditions which might operate to make particular rates repugnant to the statute.

The Act, however, is explicit in its outlawry of all unreasonable rates, and in its imposition upon the carriers of the

duty to establish rates which are reasonable. A failure to perform this duty is made an actionable tort, for which any shipper injured thereby may recover damages by reparation proceedings. *News Syndicate Co.* v. *New York Central Railroad*, 275 U. S. 179.

2. The Interstate Commerce Commission, When Acting Upon Reparation Claims, Exercises a Power Distinct From Its Rate Making Power, and Directed to a Distinctly Different Purpose.

The Interstate Commerce Commission with respect to rates exercises a double function, one legislative in its nature and the other judicial. Acting legislatively it controls rates to be exacted in the future. Acting judicially it passes upon claims for injuries alleged to have been caused by past illegal exactions. The distinction between these two functions has been declared with great clearness by this court in *Baer Bros. Mercantile Co.* v. *D. & R. G. R. Co.*, 233 U. S. 479, as follows:

> "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public."

There is, accordingly, no anomaly in an exercise by the Commission of jurisdiction to declare unreasonable and tortious a rate which exists under a maximum rate order previously made by it, for the reason that the Commission in the exercise of its rate-making function may have made the order without any consideration whatever of the particular rate involved in the reparation proceeding, or the conditions affecting the transportation, and the reasonableness of the rate complained of, may have become altogether different when the rate was exacted from what they were when the Commission's order was made.

3. The Decisions of State Courts Dealing With State Statutes Are Not Applicable.

The Court of Appeals cited in support of its decision in the instant case various state court opinions dealing with state acts. We do not analyze the cases thus cited, but content ourselves with saying that we are confident this court will find that they are not applicable. The reasons for this have been most lucidly pointed out by Judge Hutcheson in *Eagle Cotton Oil Co. v. Southern Railway,* 51 F. (2d) 443. Summarily stated, they are not applicable because the federal act providing for regulation of carriers has continued upon the carriers their common law duty to keep rates reasonable; and as one method of enforcing that duty has given to the Interstate Commerce Commission jurisdiction to make awards of damages caused by breaches of it, whereas the states from which the state court opinions are cited have imposed upon their respective commissions the duty of promulgating rates which when so promulgated by law became obligatory upon the carriers.

4. The Rates Involved Were Not Commission-Made.

The making of a maximum rate order by the Interstate Commerce Commission leaves carriers complete freedom of action in framing their tariffs, except only that they may not exceed the maximum limit prescribed by the Commission's order.

In this case the maximum rate order of June 22, 1921 prescribed a maximum rate level of 96½ cents. The rate put into effect by the carriers was 96 cents. Thereafter, on July 1, 1922, following the Commission's decision in *Reduced Rates, 1922,* without order the carriers reduced this rate to 86½ cents, and finally, on January 10, 1924, they voluntarily reduced it to 84 cents (Rec. 252-258).

In *Eagle Cotton Oil Co.* v. *Southern Railway,* 51 F. (2d) 443, rates so made were held not to be Commission-made rates. We cite this case, but we contend, as argued by Judge Hutcheson in his concurring opinion in that case, that the Interstate Commerce Commission has jurisdiction

to award reparation for damages caused by the exaction of any unreasonable rate, even though the same may have been specifically prescribed by the Commission itself.

Respectfully submitted on behalf of said

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,

JOHN E. BENTON,
General Solicitor,

CLYDE S. BAILEY,
Assistant General Solicitor.

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p. 6.

SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1931.

Arizona Grocery Company, Petitioner,
vs.
The Atchison, Topeka & Santa Fe Railway Company, et al.
} On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[January 4, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

This case turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it.

The respondent carriers maintained a rate of $1.045 per hundred pounds for shipment of sugar from California points to Phoenix, Arizona. On complaint of petitioner and others, the Commission, after hearing, on June 22, 1921 found that the rate attacked had been, then was, and for the future would be, unreasonable to the extent that it exceeded 96:5 cents,[1] and ordered the establishment of a rate not exceeding that figure. September 17, 1921, the carriers promulgated a rate of 96 cents, which they later voluntarily reduced to 86.5 cents. November 3, 1922, certain of the complainants in the earlier proceeding, other than petitioner, filed a new petition attacking the current rate. While this case was pending the carriers, on January 10, 1924, again made a voluntary reduction to 84 cents. February 25, 1925, the Commission filed a report prescribing for the future a maximum reasonable rate of 71 cents, to that extent modifying its earlier order.[2] Reparation was found to be due shippers under the old rate, but none was awarded. February 8, 1927, the second case was reopened for further consideration, but the 71 cent rate was not disturbed. In a later proceeding, with which petitioner's and other claims for reparation were consolidated, the Commission found that the rates to Phoenix from and after July 1, 1922, had been

[1] 62 I. C. C. 412.
[2] 95 I. C. C. 244.

unreasonable to the extent they had exceeded 73 cents from Northern California and 71 cents from Southern California, prescribed rates for the future from those origins to Phoenix and other Arizona destinations, and awarded petitioner and other shippers reparation in the amounts by which the rates paid (86.5 and 84 cents) exceeded those (73 and 71 cents) found to have been the reasonable rates during the period since July 1, 1922.[3]

The date of the first shipment made by petitioner on which reparation was awarded was February 21, 1923, and of the last February 5, 1925, so that all were made between the effective dates of the first and second orders above mentioned.

The respondents objected that they should not be required to pay reparations on shipments which moved under rates approved or prescribed by the Commission as reasonable. To this that body replied, "We reserve the right, upon a more comprehensive record, to modify our previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rates prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation . . . .".

The carriers having failed to pay the amount awarded, the petitioner sued therefor in the District Court, and recovered judgment. The Circuit Court reversed and entered judgment for respondents.[4] This Court granted certiorari. Whether, as the petitioner argues the Commission correctly construed its authority, is to be determined by examination of the legislation defining its powers.

The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Commission* v.

[3] 140 I. C. C. 171.
[4] 49 F. (2d) 563.

Baltimore & Ohio R. Co., 145 U. S. 263, 275. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded.

But we are here specially concerned with the Interstate Commerce Act of 1887[5] and with some of the changes or supplements adopted since its original enactment. That Act did not take from the carriers their power to initiate rates; that is, the power in the first instance to fix rates, or to increase or to reduce them. *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 564; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197. In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike.[6] Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper.[7] Although the Act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard.[8] In other words, the legal rate was not made by the statute a lawful rate,—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.[9] If the finding on this question

[5]Act of February 4, 1887, 24 Stat. 379.

[6]*Id.*, § 6. *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639, 653; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197; *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97; *Dayton C. & I. Co.* v. *Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 450.

[7]*Id.*, §§ 8, 9, 10.

[8]*Id.*, § 1.

[9]*Id.*, § 13. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 443; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562, and cases cited.

was against the carrier reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact the function of the Commission was judicial in character;[10] its action affected only the past so far as any remedy of the shipper was concerned and adjudged for the present merely that the rate was then unreasonable; no authority was granted to prescribe rates to be charged in the future. Indeed, after a finding that an existing rate was unreasonable the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable.[11] Since the carrier had complete liberty of action in making the rate it necessarily followed that upon a finding of unreasonableness an award of reparation should be measured by the excess paid, subject only to statutory limitations of time.

Under the Act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged (*Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479), or to set a maximum rate for the future (*Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission, supra*, p. 196), for the reason that so to do would be to exercise a legislative function not delegated to that body by the statute.[12]

The Hepburn Act[13] and the Transportation Act[14] evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement

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[10] *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499-500; *Baer Bros.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 486.

[11] See *Baer Bros.* v. *Denver & R. G. R. Co., supra*, p. 487.

[12] Compare *Prentis* v. *Atlantic C. L. Co.*, 211 U. S. 210, 226; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 301; *Terminal R. Assn.* v. *United States*, 266 U. S. 17, 30; *Assigned Car Cases*, 274 U. S. 564, 582.

[13] § 4, 34 Stat. 589.

[14] §§ 418-421, 41 Stat. 484-488.

has the force of a statute.[15] This Court has repeatedly so held with respect to the fixing of specific rates by state commissions,[16] and in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.

But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the boundaries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character;[17] that it may act only within the scope of the delegation; that its authority is to fix a maximum or minimum *reasonable* rate; for it is precluded by the statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity.

The report and order of 1921 involved in the present case declared in terms that 96.5 cents was and for the future would be a reasonable rate. There can be no question that when the carriers,

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[15] As a statute fixing or limiting rates to be charged by one whose business is affected by a public interest may be declared void for violation of the due process and equal protection clauses, (*Dow* v. *Beidelman*, 125 U. S. 680; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339; *Budd* v. *New York*, 143 U. S. 517; *Covington Tpk. Co.* v. *Sanford*, 164 U. S. 578) an order made by a commission created by statute is subject to the like action of the courts (*Reagan* v. *Farmers' L. & T. Co*, 154 U. S. 362; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352, 433-434). There is, however, in the case of a commission order, the additional element that the courts will examine the question whether the administrative agency of the legislature has exceeded its statutory powers (*Skinner & Eddy Corp.* v. *United States*, 249 U. S. at 562, and cases cited) or has based its order upon a finding without evidence or upon evidence which clearly fails to support it (*Northern P. R. Co.* v. *Dept. of Public Works*, 268 U. S. 39).

[16] *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 394; *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U. S. 265, 271; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 306; and compare the cases cited in note 12.

[17] *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 335.

pursuant to that finding, published a rate of 96 cents, the legal rate thus established, to which they and the shipper were bound to conform, became by virtue of the Commission's order also a lawful —that is, a reasonable—rate.

Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers and themselves become the legal rate. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is ~~equally~~ legislative in quality as ~~is~~ the fixing of a specified rate.

In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 335, it was said, "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order. . . ."

If by act of Congress maximum rates were declared lawful for certain classes of service, neither carrier nor shipper could thereafter draw into question in the courts the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute. By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within Constitutional limits, what are lawful rates for the service to be performed by the carriers. The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.

As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier its adjudication finds the facts and may involve a liability to pay reparation. The Commission may, and often does, in the

same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future. But the fact that this function is combined with that of passing upon the rates theretofore and then in effect does not alter the character of the action.[18]

As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

The Commission in its report confuses legal concepts in stating that the doctrine of *res judicata* does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself.

The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to reexamine the fairness of rates prescribed, and will put an unbearable burden upon that body. If

[18] *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499; *Baer Bros.* v. *Denver & R. G. R. Co.*, 233 U. S. 479.

this is so it results from the new policy declared by the Congr which, in effect, vests in the Commission the power to legislat specific cases as to the future conduct of the carrier. But it is to be observed that so long as the Act continues in its present fo the great mass of rates will be carrier-made rates, as to which Commission need take no action except of its own volition or u complaint, and may in such case award reparation by reason the charges made to shippers under the theretofore existing r

Where the Commission has upon complaint, and after hear declared what is the maximum reasonable rate to be charged b carrier, it may not at a later time, and upon the same or ad tional evidence as to the fact situation existing when its previ order was promulgated, by declaring its own finding as to sonableness erroneous, subject a carrier which conformed the to the payment of reparation measured by what the Commi now holds it should have decided in the earlier proceeding to b reasonable rate.

The judgment is

Affirmed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS think that judgment should be reversed for the reasons stated by Ju Hutcheson in the concurring opinion in *Eagle Cotton Oil Co. Southern Ry. Co.*, 51 F. (2d) 443, 445.

A true copy.

Test:

Clerk, Supreme Court, U.